United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,433

EMANUEL PEA, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From an Order of the United States District Court for the District of Columbia

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(By Appointment of this Court)

February 2, 1967

STATEMENT OF QUESTIONS PRESENTED

1. Whether, in view of Appellant's physical and mental condition and the absence of advice concerning his rights to remain silent and to obtain counsel, his oral confession to a police officer was involuntary, and therefore erroneously admitted into trial evidence.

2. Whether the failure of a police officer to advise a wounded captive in a hospital emergency room of his rights to remain silent and to obtain counsel before responding to police interrogation vitiates an oral confession elicited during such interrogation.

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BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This appeal is from an opinion and an order of the District Court, filed July 11, 1966, by which Appellant's alleged confession was found to be voluntary. By order of the District Court, filed July 20, 1966, Appellant was allowed to proceed on appeal without prepayment of costs. The District Court had jurisdiction under 11 D.C. Code §521 (Supp. V, 1966), and this Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE CASE

Preliminary Statement

Appellant originally was convicted of first degree murder in the death on June 28, 1960 of his wife Harriet Pea and of assault with a dangerous weapon upon a bystander. Judgment and sentence were entered by the District Court on April 14, 1961. The judgment was vacated and a new trial ordered by this Court because Appellant was represented at his trial by an imposter who was not a lawyer.

Appellant was tried again and convicted of second degree murder and assault with a dangerous weapon. He was sentenced on March 15, 1963 to 15 years to life imprisonment on the murder count, and 40 months to 10 years imprisonment on the assault count, the sentences to run concurrently. This conviction was affirmed by this Court on October 10, 1963. 116 U.S.App.D.C. 410, 324 F.2d 442.

At both trials, the principal evidence against Appellant was an oral inculpatory statement allegedly made to a police officer when Appellant was in the emergency room of a hospital with a bullet in his head.

On June 22, 1964, the Supreme Court of the United States granted certiorari and summarily vacated the judgment of this Court, remanding the case in accordance with Jackson v. Denno, 378 U.S. 368 (1964), for a hearing on the question of the voluntariness of the confession. 378 U.S. 571.

A hearing was held, and Judge William B. Jones [1/] of the District Court found beyond a reasonable doubt that the oral confession was voluntary. This appeal followed.

1/ Judge Hart who had presided at the second trial was unavailable for the confession hearing due to illness, and the matter was reassigned to Judge Jones.

Statement of the Facts [2/]

Appellant was arrested in the District of Columbia shortly after 10:30 P.M. on June 28, 1960. A police officer found him leaning or sitting against a car parked at a street curb, a revolver and a whiskey bottle at his feet. (Appellant and a bystander testified that Appellant had been drinking. (T.Tr. 188, 189, 190, 192, 212; Coroner's Tr. 7-8.) [3/] He was bleeding from a bullet wound in his head and the officer thought he was dazed. On a sidewalk nearby his wife lay dead or dying from bullet wounds. (T.Tr. 64-67, 70, 72-74.)

Two police officers supported Appellant in taking him to a police vehicle, in which he was transported to Sibley Memorial Hospital which was then located a few blocks away. (T.Tr. 74-76.) The medical records at Sibley state that he was examined and his right eye was found devoid of vision, swollen, tender and painful; palpitation revealed tenseness and evidence of fluid in the socket of the eye; the report also contained a notation that he was "conscious," "ambulatory" and "coherent." The examining doctor suggested that a neurosurgeon be called. (Defendant's Exh. 1; Opinion, p. 6.)

Detective Edwin Coppage of the Metropolitan Police Department's Homicide Squad arrived at the scene of the shooting at approximately 10:45 P.M., shortly

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2/ Abbreviated citations herein are to the lower court's Opinion following the confession hearing ("Opinion"); the transcript of the confession hearing ("Tr."); the transcript of Appellant's second trial ("T.Tr."); the transcript of Appellant's first trial ("1st T.Tr."); the transcript of the Coroner's Inquest in the matter of Harriet Pea,Deceased, Case No. 26-099, August 5, 1960 ("Coroner's Tr."); and the transcript of the deposition of Dr. Carlos Mena Diaz, Sept. 25, 1965 ("Dep.Tr.").

3/ The transcript of the Coroner's Inquest is not a part of the record on appeal. Counsel for Appellant have sent a copy of the transcript to the Clerk of the Court with the request that it be lodged with the Court. Counsel believe that the Court may take judicial notice of such a proceeding, and, as will appear herein, that certain portions of the testimony in that proceeding should, in the interest of justice, be considered in deciding this appeal. See Shafer v. Children's Hospital Soc., 105 U.S.App.D.C. 123, 265 F.2d 107 (1959); Fletcher v. Jones, 70 U.S.App.D.C. 179, 105 F.2d 58, cert. denied, 308 U.S. 555 (1939).

after Appellant was taken away (Tr. 14). He discussed the events briefly with the arresting officer, and then proceeded to the emergency room at Sibley Memorial Hospital where at approximately 10:53 P.M. he found Appellant lying on a table (Tr. 15, 16, 18). Two police officers, a physician, and two nurses were in the room (Tr. 16). Detective Coppage testified that he asked and received permission from the physician to talk with Appellant (Tr. 18). At that time, Appellant apparently was still bleeding slightly (Tr. 47, T.Tr. 105). Coppage stood close to the table, about two feet from Appellant's face (Tr. 19). He identified himself to Appellant as a police officer and

> "[t]hen I asked him, as I remember, his name; where he lived. I further told him that it had been stated to me that he had shot his wife, down in the unit block of I Street." (Tr. 19.)

The detective testified that Appellant then told him that he had shot his wife after she refused to resume living with him, and that he had shot himself thereafter because the screams of their children unnerved him. The police officer also testified that the confession included details of what Appellant and his wife and children had been doing immediately prior to the shootings. (Tr. 19-21.) Coppage did not have his original notes on the interview with Appellant. He stated he had destroyed them after making a typewritten report (T.Tr. 125).

Detective Coppage testified at the confession hearing on July 1, 1966 that the questioning of Appellant on this occasion took "not over five minutes" (Tr. 21). In his testimony at Appellant's first trial on March 13, 1961, Coppage testified that he talked with Appellant at Sibley Hospital for "a period of between 15 and 20 minutes" (1st T.Tr. 67). At the second trial in early 1963, Coppage testified that he remained in the "immediate

presence" of Appellant during the entire time at Sibley and until the time Appellant was admitted to D.C. General, to which he was taken from Sibley (T.Tr. 148).

Appellant appeared to be "coherent" to Coppage. He further stated that: "The story he told me made sense, and he spoke out. He didn't appear to have any trouble talking." (Tr. 22.) At the Coroner's inquest, Coppage testified that he could not complete his interrogation at the hospital "due to his [Appellant's] condition" (Coroner's Tr. 10).

At no time in the course of this case did Detective Coppage testify that he advised Appellant that he had a right to remain silent, that whatever he said could be used against him, and that he had a right to obtain legal counsel.

After questioning Appellant at Sibley, Coppage asked the physician in the room if Appellant "was able to be transferred to D.C. General Hospital" where there were guarded facilities for prisoners (T.Tr. 107; cf. Tr. 31-33; Defendant's Exh. 1; Opinion, p. 6). The Sibley Hospital record recites in part: "Police officer inquired whether the patient is safe to be carried by ambulance to D.C. General Hospital where he can be constantly guarded. I believe the patient can withstand the trip." (Defendant's Exh. 1.) The physician is reported to have said also that it would be "far better" if Appellant were moved by ambulance rather than by police wagon (T.Tr. 114; cf. Tr. 23). Appellant raised himself to a sitting position before being helped onto the ambulance stretcher (Tr. 24-25). The detective rode to D.C. General Hospital with Appellant (Tr. 25).

Appellant was admitted to D. C. General Hospital at 11:40 P.M. (Defendant's Exh. 2A; Opinion, p. 7). The doctors there asked him questions and he had trouble answering them, and they could not understand what he was saying (Tr. 27).

Coppage informed the doctors that Appellant had shot himself (T.Tr. 134, 166; cf. Tr. 35-36). The D.C. General Hospital record on Appellant states: "On admission plaintiff is conscious, has a strong odor of alcohol on his breath and is very confused." (Defendant's Exh. 2A; Tr. 38.)

About one or two o'clock in the morning after Appellant's admission to D.C. General Hospital, Dr. Carlos Mena Diaz, then chief resident neurosurgeon at the hospital, examined him in the emergency room (Tr. 52, 53, 58). He observed that Appellant was intoxicated and lethargic. His blood pressure, pulse and respiration were normal. Dr. Mena testified: "He can talk but he cannot talk fluently and he just answered questions yes or no, but he was, I would say, conscious." Dr. Mena further testified by deposition that "his both eyes were very swollen and edematous - I recall edematous and sign of big hemorrhage, especially the right eye." He could see nothing with his right eye, and only a "little light" with his left eye. An X ray viewed by Dr. Mena showed that the bullet had destroyed the right optic nerve and was implanted in the middle of the skull. Small pieces of bone and bullet were sprayed over the front of the sinus. (Tr. 54, 55.) The X ray showed no brain damage (Tr. 58, 59).

Dr. Mena, now a practicing neurosurgeon in Honduras, also testified that Appellant had definitely sustained a brain concussion - "A shaking, so that the person at that moment and even the next day cannot be normal, in a normal condition" (Tr. 7, 55-56). He testified further as to the "syndrome of concussion - that is, little confused, and lethargic," that a person with a brain concussion can have headaches, dizziness and amnesia, and that "the sign of

concussion is immediate" (Tr. 56, Dep. Tr. 11). [4] He also stated that Appellant's intoxication and brain concussion produced a state of lethargy in which "he doesn't care anything. He can answer yes or no to any question that somebody asks. * * * [H]e was indifferent to protect himself or not to protect him." (Tr. 57.)

Dr. Margaret Ives, chief psychologist at St. Elizabeths Hospital, examined Appellant during his confinement there in September and October of 1960 (T.Tr. 257). She testified at trial that at the time he was examined he was "functioning as a mental defective of moderate degree" (T.Tr. 260). His testing showed an I.Q. of 69 (top of moron group) (T.Tr. 301-02), he exhibited "a weakness in abstract thinking" (T.Tr. 260), and the test results indicated that at some time in his past Appellant had suffered organic brain damage (T.Tr. 278).

Appellant testified - both at trial and at the confession hearing - that he did not recall even being at Sibley Hospital or talking with Detective Coppage at that time. His testimony at the trial was that his wife shot him first, that he then lunged at her across the automobile seat on which they were sitting, and in the course of the ensuing scuffle she must have been shot. He could not remember anything else until he awoke buckled down in a bed in D. C. General Hospital. (Tr. 61; T.Tr. 192-93.)

Appellant, a Negro with a 9th grade education, was 28 years old in 1960. The record below is silent as to whether or not he had any previous arrests or convictions. [5]

4/ The portion of Dr. Mena's deposition testimony which refers to "dizziness" and his statement that the "sign of concussion is immediate" were not read into the record at the hearing before Judge Jones.

5/ Counsel have obtained the D.C. Metropolitan Police Record of Appellant, and it shows only an arrest for drunkenness on one occasion.

CONSTITUTION AND RULE INVOLVED

Amendment V to the United States Constitution and Rule 5, Federal Rules of Criminal Procedure, are set forth in the Appendix hereto.

STATEMENT OF POINTS

1. The court below erred in finding that Appellant's oral confession was made voluntarily.
2. The court below erred in failing to hold that the confession was inadmissible because Appellant was not advised by the police officer of his constitutional rights to remain silent and to have the benefit of counsel before police interrogation.

SUMMARY OF ARGUMENT

I.

It cannot be reasonably found on the facts of this case that Appellant's confession was the result of his "free and rational choice" and hence was given voluntarily.

The evidence shows that Appellant had suffered a brain concussion less than an hour before he was questioned. The bullet that caused the concussion had lodged in his skull, spraying bits of bone and metal into his frontal sinuses. He was blinded in one eye, and almost sightless in the other. The area around both eyes was badly swollen and edematous. At the time he was questioned, he was lying on a table in the emergency room of a hospital with the police officer standing over him. Upon his arrest a short time previously, Appellant was dazed, and a short time after interrogation he was found by hospital doctors to be confused, lethargic, intoxicated, and could not speak fluently. It must be fairly concluded that these conditions prevailed substantially the same at the time he was interrogated.

A neurosurgeon testified that, because of the brain concussion and intoxication, a person in Appellant's condition "doesn't care anything" and is "indifferent to protect himself," a conclusion unrebutted by the Government. The interrogating officer broke off questioning of Appellant "due to his condition." Appellant testified that he did not remember any of the events after the shooting until he awoke in a bed in D.C. General Hospital sometime after he had been examined in the emergency room of two hospitals. This account is consistent with expert testimony that a brain concussion may cause amnesia. The hearing judge did not expressly find that Appellant's account was not to be believed.

As with much of the evidence, he summarized Appellant's testimony without further comment. If this testimony was credited, it should have had significant implications in determining the voluntariness of the confession - implications which the hearing court did not explore.

At no time on any of the four occasions on which he testified did the police officer indicate that he had advised Appellant that he had a right to remain silent, that anything he said could be used against him, and that he had a right to obtain counsel. It is inferable that he did not so advise Appellant. As the Supreme Court has pointed out, police interrogation under such circumstances is "inherently coercive," and the absence of such advice is a "significant factor" to be considered in pre-Miranda cases in determining whether a confession was given voluntarily. The burden is on the Government to prove that such advice was given. The hearing judge made no finding on this matter, and so far as the record discloses, did not consider this significant factor in reaching his ultimate conclusion that the confession was voluntary.

Appellant's tests showed he had an I.Q. of 69, was "functioning as a mental defective," and apparently sometime before the examination had suffered organic brain damage. Moreover, there is no indication that he had had experience in law-breaking that would have acquainted him with the inquisitorial practices of the police and with his rights in resisting such practices. Thus the situation presented is one in which the accused - unequipped by education or experience to deal with the police, physically and mentally disabled to a point of being indifferent to his self-protection, and lacking even the rudimentary legal advice that under ordinary conditions could have alerted him to his jeopardy - is nevertheless found responsible for a "voluntary" confession.

The rationale of the Supreme Court's recent confession cases does not permit the conclusion that the confession was given by Appellant voluntarily. Doubt on this point must be resolved in favor of the accused. The numerous confession cases in which the Supreme Court has reviewed the evidence to reach its own determinations of voluntariness confirm the power and duty of this Court to make a de novo finding in this case.

II.

When this case was in this Court before, the Court, in a per curiam decision, implied that if there had been some showing in the lower court that the police detective, before questioning Appellant, had not warned him of his right to remain silent, the conviction would not have been allowed to stand. The Court did not reverse because in the District Court neither prosecution nor defense had "sought to ventilate the issue." The issue was finally argued by defense counsel at the confession hearing, but the Government took the position that the issue was not properly raised there. It is submitted that it was plain error for the District Court to admit the oral confession at trial without a showing that the police officer had warned Appellant of his rights. And the error was clearly prejudicial, because without the confession the Government would have had only circumstantial evidence that a murder was committed, rather than the accidental or excusable homicide indicated by Appellant's version of the facts.

Miranda, decided subsequently to this Court's decision, made it clear that in dealing with custodial interrogation a reviewing court should "not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a

record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record." The Court's reasoning was that "since the State is responsible for establishing the isolated circumstances under which the interrogation takes place . . . the burden is rightly on its shoulders."

This reasoning is applicable here, even if this Court does not choose to apply retroactively the right to counsel requirement of Miranda. In Miranda, the Court observed that because of the federal supervisory rules, it had had little occasion in the past quarter-century to reach the constitutional issues in dealing with federal interrogations, but that these rules were nonetheless responsive to the same considerations of Fifth Amendment policy. Thus, Rule 5 of the Federal Rules of Criminal Procedure is recognized by the Supreme Court as requiring of federal courts a high standard of fairness only recently imposed prospectively and in stricter degree upon state and federal courts alike. And federal courts, like state courts, "are still entirely free . . . to apply those standards in a broader range of cases than is required" by the decision in Johnson v. New Jersey, in which the Supreme Court announced that the constitutional rule of Miranda would be applied prospectively to future trials.

The long-standing federal supervisory standard requiring that the accused be given advice as to his rights - preferably by a judicial officer, but, as this Court implied, at least by an interrogating police officer - requires what is in effect a retroactive application of at least that portion of Miranda which deals with the right to remain silent. Such a standard is clearly foreshadowed by numerous cases in this jurisdiction, and by the U.S. Attorney's own instructions to police officers prior to Appellant's arrest.

ARGUMENT

I.

APPELLANT'S ORAL CONFESSION TO A POLICE OFFICER WAS INVOLUNTARY BECAUSE OF APPELLANT'S PHYSICAL AND MENTAL CONDITION AND THE ABSENCE OF ADVICE CONCERNING APPELLANT'S RIGHTS TO REMAIN SILENT AND TO OBTAIN COUNSEL

(With respect to Point I, Appellant desires the Court to read the following pages of the transcript: 6/ Tr. 3, 7, 10-12, 14-16, 18-22, 24-25, 27, 29, 31-33, 35-36, 38, 52-59, 64, 81-82, 85-86, 98-100, 104; T.Tr. 64-67- 70, 72-76, 98, 105, 107, 114, 131, 134, 148, 166, 188-90, 192-93, 212, 257, 260, 278, 301-02, 324; 1st T.Tr. 58, 67; Coroner's Tr. 7-8, 10; Dep. Tr. 11; Defendant's Exhibits 1 and 2A.)

Under the factual circumstances which existed in this case, the confession was involuntary, whether this conclusion is expressed in terms of "the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion." Blackburn v. Alabama, 361 U.S. 199, 207 (1960). The Supreme Court has pointed out that whether a confession can be said to be voluntary depends upon the "totality of circumstances" at the time it was given. Haynes v. Washington, 373 U.S. 503, 514 (1963). It is submitted that the circumstances in this case combined to provide a situation "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom . . . ." Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944).

Although the salient facts appear in the "Statement of the Case," supra, and hence the discussion below is to some extent repetitive, it is believed that in view of the nature of the issues involved, a marshalling of the facts in this part of the brief is warranted.

6/ For legend to transcript abbreviations, see footnote 2 in Statement of the Case, supra.

A. Appellant Was Intoxicated and Had Suffered a Brain Concussion, Making Him "Indifferent" to His Self-Protection.

The testimony of a police officer at Appellant's trial in 1963 established that Appellant was dazed at the time he was arrested and that he was sent to the hospital with a bleeding head wound. A whiskey bottle was found at his feet. According to a bystander, Appellant had been drinking just after the shooting and Appellant testified that he had been drinking since that afternoon. He was supported by two officers in going to the police wagon to be taken to Sibley Hospital. The police officer's statement to a coroner's jury that he had to cease questioning Appellant "due to his condition" (Coroner's Tr. 10) may have referred to the head wound from which he was bleeding or to the state of intoxication, but in either sense, it tends to confirm the view that he was not sufficiently composed and rational to be interrogated by the police about such a grave matter.

Dr. Carlos Mena Diaz, a neurosurgeon then at D.C. General Hospital, testified on deposition that he had examined Appellant at the hospital within an hour or two after he was admitted and that Appellant was intoxicated and had "definitely" (Tr. 55) suffered a brain concussion from the bullet wound. He said that the effect of a concussion was "immediate" (Dep. Tr. 11) and "the person at that moment and even the next day cannot be normal . . ." (Tr. 55). Dr. Mena stated that, when examined, Appellant was lethargic and could not talk fluently as a result of the concussion and the alcoholic intoxication. In this state of lethargy, Dr. Mena said, Appellant "doesn't care anything. He can answer yes or no to any question that somebody asks. * * * [H]e was indifferent to protect himself or not to protect him." (Tr. 57.) It may be noted also that

Appellant's admission record at D.C. General stated that he was "conscious," had a "strong odor of alcohol on his breath" and was "very confused" (Defendant's Exh. 2A; Tr. 38).

Without clearly contradictory evidence, it would be unreasonable to reject these compelling medical findings made at D. C. General Hospital simply because the interrogation occurred about 45 minutes or one hour before Appellant's admission to D.C. General. It is reasonable only to suppose that Appellant was at least as inebriated at Sibley as he was later at D.C. General to which he was conveyed in a police ambulance under police guard. The police detective who was with Appellant until he was turned over to physicians at D.C. General Hospital testified that Appellant drank no alcoholic beverage during that interval (Tr. 29). Moreover, there is undisputed evidence that Appellant was dazed and had been drinking at the time of his arrest, before the interrogation.

B. Appellant Was Physically Disabled by the Bullet Lodged in His Head.

There are other circumstances which strongly suggest that Appellant was not in a suitable condition for questioning designed to produce self-incriminating statements. Appellant was still bleeding from the head wound. His eyes were badly swollen, edematous, tender and painful. He was blinded in the right eye by the bullet's severance of the optic nerve and his sight in the left eye was also impaired. A skull X ray showed that small pieces of bone and bullet sprayed over the frontal sinuses. Appellant's general condition was such that the police officer was moved to ask the doctor whether it was "safe" (Defendant's Exh. 1) or whether Appellant was "able" (T.Tr. 107) to be transferred to D.C. General where he could be guarded. Although the doctor decided that Appellant could "withstand" (Defendant's Exh. 1; Opinion, p. 6) the trip, he asked that Appellant, though ambulatory, be taken to D.C. General in an ambulance rather than in a police wagon.

C. Appellant Was Neither Intelligent Nor Sophisticated in Criminal Matters.

There was uncontradicted testimony by the chief psychologist at St. Elizabeths Hospital that her testing of Appellant, about three months after the confession was given, showed him to be "functioning as a mental defective of moderate degree" (T.Tr. 260). Dr. Margaret Ives testified that Appellant showed an I.Q. of 69, the top of the moron group. Furthermore, her psychological testing indicated that, at some time in the past, Appellant had suffered organic brain damage. 7/

The low mentality of an accused is an important factor in determining the voluntariness of his confession. Townsend v. Sain, 372 U.S. 273, 308 n.4 (1963); Reck v. Pate, 367 U.S. 433, 442 (1961); Fikes v. Alabama, 352 U.S. 191, 193, 196, 197-98 (1957).

Moreover, Appellant, A Negro with a ninth-grade schooling, did not have the education, experience, or assistance of counsel that in ordinary circumstances might have reassured the Court that in dealing with the police he could have withstood the pressures upon him. As the Supreme Court has pointed out, the character and background of the accused are "highly material" in determining whether a confession was given voluntarily. Fikes v. Alabama, 352 U.S. 191, 193 (1957). The factors of low mentality, sparse education, and lack of substantial previous involvement with criminal proceedings must be taken into account. Reck v. Pate, 367 U.S. 433 (1961); Fikes v. Alabama, supra.

7/ Cf. King v. United States, D.C. Cir. No. 19,641, decided Dec. 21, 1966, slip op., p. 19, where it is noted that Government psychiatrists called by the defense in that case had testified that organic brain injury or disease might be detected with psychological testing where physical tests had failed to detect it.

These and other factors in this case heighten the importance of the indisputable fact that Appellant did not have counsel to protect his rights. Compare Reck v. Pate, supra at 441 (retarded teenager with less than seventh-grade education and no criminal record: confession involuntary) with Crooker v. California, 357 U.S. 433, 438 (1958)(31-year old college graduate who had studied criminal law during his one year in law school: confession voluntary).

In the Fikes opinion, supra at 197-98, the Court quoted from Stein v. New York, 346 U.S. 156, 185 (1953) in an effort to define the allowable limits to the "totality of the circumstances":

> "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."

D. Appellant Denied Remembering the Interrogation in Which He Gave the Confession.

The hearing judge stated (Opinion, p. 8):

> "Defendant testified at the hearing that he could not remember being in Sibley Memorial Hospital nor of having seen Detective Coppage until the Coroner's Inquest sometime after he was discharged from D.C. General Hospital."

The court also stated (ibid.):

> "[Dr. Mena] stated that the concussion could have produced headaches and amnesia, but his testimony did not state that the defendant had actually suffered from either."

The court concluded its Opinion by stating (Opinion, p. 9):

> "This opinion shall serve as findings of fact and conclusions of law on the question of the voluntariness of the defendant's confession."

On the record, there is nothing to show that the lower court disbelieved and refused to credit Appellant's testimony of amnesia. It is possible that the judge chose to ignore this testimony because he thought it did not bear on the

voluntariness of the confession. If such is the case, a serious question arises as to the correctness of this reasoning. At the least, the testimony, if credited, would be one more circumstance suggesting that the confession was given at a time of extreme stress in which Appellant could not exercise free will.

E. Appellant Was Not Advised of His Rights Before Being Questioned.

The record does not disclose that, before questioning Appellant, the police officer advised him that he had a right to remain silent, that anything he said could be used against him, and that he had a right to obtain an attorney.

In the course of testifying in this case at a coroner's inquest, two trials and the confession hearing, the only matters of which the police officer said he "advised" Appellant were that he was a police officer and that he understood that Appellant had shot his wife. 8/ At both trials and at the confession hearing, the detective gave a detailed account of how he opened the questioning, without any mention of advice about Appellant's constitutional rights.

The hearing court made no finding on this subject. When it was raised in closing argument by defense counsel (Tr. 81-82, 85-86), the Government discussed the point as a Mallory rule question, and took the position that it was not properly in issue (Tr. 110-12).

8/ The knowledge that his questioner was a police officer may have had an effect opposite to that of advising Appellant that he could remain silent. The Supreme Court in Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966), quoted Lord Devlin's comment: "It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worst for you if you do not." Devlin, The Criminal Prosecution in England 32 (1958).

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that an accused must be advised, before questioning, that he has a right to remain silent, that anything he says may be used against him, and that he may have a lawyer, provided for him if necessary. In Johnson v. New Jersey, 384 U.S. 719 (1966), the Court held that this rule, as an absolute constitutional requirement, would not be applied retroactively. However, the Court stated therein (id. at 730) and in Davis v. North Carolina, 384 U.S. 737, 740 (1966), that confession cases would still be reviewed with retroactive application of all law in the area of involuntariness. Specifically, the Court announced in the Davis case (384 U.S. at 740-41) that

> "the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by Miranda, is a significant factor in considering the voluntariness of statements later made. This factor has been recognized in several of our prior decisions dealing with standards of voluntariness. [Citations omitted.] Thus, the fact Davis was never effectively advised of his rights gives added weight to the other circumstances described below which made his confession involuntary."

In Davis, the Court gave important consideration to this factor even though there was no affirmative evidence of absence of such advice. The Court was drawn to this result because "there is no indication in the record that police advised him of any of his rights until after he had confessed . . . . *** [N]o waiver of rights could be inferred from this record . . . "(id. at 739-40).

Davis makes specifically applicable to voluntariness cases the conclusion only just before reached with respect to the new rule of Miranda. In the latter case, the entire Court indicated that the burden is on the prosecution to produce evidence that the accused was advised of his rights. 384 U.S. at 475, 479, 497-99 (majority opinion); 504, 518 (dissenting opinions). The majority stated (id. at 498-99):

> "In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record."

Elsewhere, the Court stated (id. at 475):

> "Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders."

In Mitchell v. United States, 114 U.S.App.D.C. 353, 357, 316 F.2d 354, 358 (1963), this Court excluded a confession given after a preliminary hearing "since the record provides no assurance that the accused was adequately informed of his rights . . . ."

Because the prosecution has produced no evidence on this point in this case, and especially because no mention of such advice was made by the interrogating officer in his testimony given on several occasions (see Miranda v. Arizona, supra at 497-98), it must be assumed that no such advice was given Appellant. This "significant factor" warrants particular consideration by this Court, because the court below did not undertake to consider it at all.

Several times the Supreme Court has referred to the "inherently compelling pressures" of interrogation without proper safeguards. 384 U.S. at 467, 468, 478. Although the Miranda holding is not precisely applicable to the case at bar, the statements therein concerning the central importance of this advice to the suspect's free choice are highly persuasive.

F. The Findings Emphasized by the Hearing Court Are Not Persuasive.

The hearing judge focused upon the following evidence in his summation paragraph (Opinion, pp. 8-9) in which he concluded that the confession was voluntary:

(1) The detective, until informed by defendant, knew nothing of the circumstances related in the confession.

(2) A physician "approved of Coppage conversing with defendant," and "approved of his transfer by ambulance to D.C. General Hospital."

(3) While at Sibley Hospital, where he was interrogated, Appellant was "ambulatory, conscious and coherent." His physical strength was sufficient to enable him to raise himself to a sitting position on the table where he had been lying.

Although the court does not explain the significance of point (1), the reasoning advanced by the prosecutor in closing argument (Tr. 64) was that it had a bearing upon the manner of the policeman's questioning; i.e., if he did not know the answers he could not have asked coercive questions. But each piece of information which the detective elicited from Appellant might well have suggested another question calling for a simple "yes" or "no" answer. Moreover, even if Appellant gave incriminating statements in narrative form, this fact would not negate the thrust of our argument that Appellant, while in custody and responding to questioning initiated by a law enforcement officer, was in such a condition as to be incapable of making a reasoned and knowing choice as to whether or not he should incriminate himself. Finally, if the court attached significance to this point (1) because of its relevance to the reliability of the police officer's account of the confession, suffice it to note that the truth or falsity of the confession is not relevant to its voluntariness. Jackson v. Denno, 378 U.S. 368, 384-85 (1964); Rogers v. Richmond, 365 U.S. 534 (1961).

Point (2) seems to suggest positive medical approval of the interrogation and the ambulance transfer carried out by the police officer. In fact, it is

not known to what extent the physician in charge may have had unexpressed misgivings about this treatment of his patient. In any event, it is obvious that a patient's capability to answer questions without further endangering his physical condition is not determinative of the patient's mental competence "to choose to speak in the free and unfettered exercise of his own will" (Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

Point (3) is only slightly pertinent. Physical motor strength may give some indication of ability to resist police questioning, but it does not contradict the other factors in this case militating against free will. Moreover, a person may be coherent and yet lack the physical and mental state which is requisite for free choice under the added pressure of police questioning. In Blackburn v. Alabama, 361 U.S. 191, 204 (1960), the Supreme Court was unimpressed with the chief deputy sheriff's observation that at the time of his confession the accused had "'talked sensible and give [sic] sensible answers,' was clear-eyed, and did not appear nervous." The Court stated in this connection:

> "It is interesting to note that Blackburn's medical records disclose that in 1944 he was given a diagnosis of 'Psychosis, manic depressive, manic phase,' and yet was said to answer questions 'relevantly and coherently.'" 361 U.S. at 209 n.8.

And in Ashcraft v. Tennessee, supra at 151, 154, the Court found certain circumstances of interrogation "inherently coercive" despite testimony that the accused was "'cool,' 'calm' 'collected,' 'normal'; that his vision was unimpaired and his eyes not bloodshot; and that he showed no outward signs of being tired or sleepy."

G. The Findings of the Hearing Court Are Incomplete.

The court below discounted the highly significant testimony of the neurosurgeon at D. C. General Hospital, apparently because "it was defendant's condition at

Sibley Memorial Hospital when he made his confession that is critical here" (Opinion, p. 8). Yet, as has been shown, that physician's testimony included a conclusion concerning Appellant's will power that presumably would have been correct a fortiori at the time Appellant was at Sibley. It should be noted that a critical portion of Dr. Mena's deposition, stating that the effect of a concussion is "immediate," (Dep. Tr. 11) was not read into the hearing record.

Also, it appears from a colloquy during oral argument (Tr. 98, 99, 100, 104) that the judge did not believe that the D.C. General evidence of Appellant's intoxication was proof enough that Appellant was intoxicated at the time of the interrogation. This conclusion, it is submitted, is clearly erroneous in light of the testimony concerning Appellant's drinking prior to arrest, the whiskey bottle found with the gun at his feet, and the absence of any opportunity for the Appellant to have imbibed any alcoholic drink after his interrogation.

The hearing judge apparently gave no consideration to the following evidence because it was not introduced at the hearing as it had been in prior proceedings in the case: 9/ Appellant was in a dazed condition when arrested a short time before interrogation; the interrogating officer told a coroner's jury that he was forced to stop questioning Appellant "due to his condition" (Coroner's Tr. 10); and the chief psychologist at St. Elizabeths Hospital found Appellant to be a mental defective with an I.Q. of 69 and with possible organic brain damage.

Nor did the hearing judge make a finding concerning the "significant factor" of whether the police detective had given Appellant advice concerning his rights

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9/ The hearing judge stated that he would not review any of the previous record in the case except that which was put into evidence at the hearing (Tr. 10, 11, 12).

to remain silent and to have counsel. Further, the court made no finding concerning Appellant's general background and experience in dealing with police. Finally, as already discussed, the lower court did not directly rule upon the credibility and significance of Appellant's testimony of amnesia.

In finding (Opinion, p. 5) - based upon the detective's testimony at the confession hearing - that "Coppage's entire conversation with the defendant lasted no more than five minutes, during which Coppage asked only several questions requiring a yes or no answer," the court was obviously unaware that this testimony is contradicted at least in part by the detective's own testimony at Appellant's first trial, less than nine months after the interrogation and more than five years before the recent testimony. At that earlier proceeding, the police officer said that he talked with the defendant at Sibley for "a period of between 15 and 20 minutes." (1st T.Tr. 67.) In view of the condition of Appellant at the time, that difference in the questioning time is obviously very material. In this connection, it may also be noted that the detective remained with Appellant the entire time that they were at Sibley and until Appellant was admitted to D.C. General.

H. The Voluntariness Standard Developed by the Supreme Court Requires That This Confession Be Excluded.

The Supreme Court has repeatedly stated that it is the duty of a reviewing court "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." E.g., Davis v. North Carolina, 384 U.S. 737, 741-42 (1966). Furthermore, "Any doubt as to whether the confession was voluntary must be determined in favor of the accused . . . ." Bram v. United States, 168 U.S. 532, 565 (1897); cf. Clifton v. United States, D.C.Cir. No. 19,757, decided Nov. 15, 1966, slip op., pp. 8-10, 14-15, petition for cert. filed

(Misc. No. 1070, 1966 Term). While it may be necessary for the Court "to make fine judgments as to the effect of psychologically coercive pressures," this is "inherent in determining whether constitutional rights have been violated." Haynes v. Washington, 373 U.S. 503, 515 (1963).

The Supreme Court also stated in Blackburn v. Alabama, 361 U.S. 199, 207 (1960):

> "[A] complex of values underlies the stricture against use by the state of confessions, which by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case."

And in Jackson v. Denno, supra at 384-85, the Court said that "[T]he reliability of a confession has nothing to do with its voluntariness." And it was held prior to Miranda that the propriety of police purpose is irrelevant to voluntariness. Townsend v. Sain, 372 U.S. 293, 309 (1963).

The Court in Miranda concluded that "without proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Miranda v. Arizona, supra at 467. This broad conclusion is a new factor which should be considered in the substantive test of voluntariness, a test which "has become increasingly meticulous through the years." Johnson v. New Jersey, 384 U.S. 719, 730 (1966). It should be weighed in the Court's determination of Appellant's involuntary confession claim. Such a claim presents no problem of retroactivity. Johnson v. New Jersey, supra at 730, 735. The Miranda and Johnson cases taken together have created for voluntariness cases a "special circumstance" rule 10/ which

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10/ See Betts v. Brady, 316 U.S. 455 (1942).

compels a finding of involuntariness in the case of prisoners "who can show denial of Miranda rights plus a little something more - very little more, to judge from the Court's citation of Haynes v. Washington." The Supreme Court, 1965 Term, 80 Harv. L. Rev. 91, 138 (1966). In Haynes v. Washington, 373 U.S. 503 (1963), as the Supreme Court itself later pointed out, the Court "held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances [chiefly the absence of advice concerning his rights] to allow a suspect to call his wife until he confessed." Malloy v. Hogan, 378 U.S. 1, 7 (1964).

The facts of the instant case show that circumstances existed which impaired rational freedom of choice and which compounded the inherent pressures of the custodial interrogation carried out without the safeguards of legal advice. When the facts of Appellant's serious injury a short time before questioning, the physical and mental results of those wounds, his low mentality from whatever cause, his inexperience in dealing with the police, and the absence of any explanation of his rights, are considered together, the ultimate conclusion must follow that Appellant in making the confession "did not choose to speak in the free and unfettered exercise of his own will" (Malloy v. Hogan, supra at 8). In summary, Appellant's "will was overborne" (Reck v. Pate, 367 U.S. 433, 440 (1961) 11/ by a combination of internal and external pressures; 12/

11/ Accord, Miranda v. Arizona, supra at 465 ("free and rational choice"); Blackburn v. Alabama, supra at 208 ("rational intellect and a free will"); Payne v. Arkansas, 356 U.S. 560, 567 (1958)("free choice").

12/ In 1958, the U.S. Attorney for the District lectured police officers regarding suspect interrogation in a hospital, instructing the police to give advice of constitutional rights and stating further: "You must satisfy yourself that the man who is being questioned is not under sedation, is not drunk, that he hasn't been hit on the head - in other words, that he knows what he's doing and his action is a voluntary act." Reprinted in Hearings on H.R. 11477 et al. Before a Subcommittee of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. 411 (1958)(emphasis added).

it seems clear that he did not make, and was incapable of making, a free choice to waive his constitutional rights. High standards of proof are required for the waiver of constitutional rights (Johnson v. Zerbst, 304 U.S. 458 (1938)). These standards apply with full force to interrogation while a prisoner is under guard, lying on a table in an emergency room of a hospital, with a bullet freshly lodged in his head, his vision lost in one eye and impaired in the other, and suffering the shock attendant upon a brain concussion.

Aside from the Appellant's incapability of exercising free choice in the situation described above, the circumstances of such private interrogation raise many of the concerns which have long weighed upon the courts and which have been in great part obviated for future trials by the Miranda decision. It was an interrogation without corroboration to confirm the police officer's story (and in this case Appellant claimed not to be able to remember the incident, thus precluding even a self-defensive denial of the account); without judicial supervision to assure the impartial and accurate adducement of evidence (the interrogating officer had even destroyed his original notes); and without the presence of an attorney to properly safeguard the defendant's rights. Curiously, even though two other police officers as well as medical personnel were present in the emergency room at Sibley Hospital, the Government, which had the burden of proof below, did not call them to testify about Appellant's condition at the time of questioning or the manner in which the interrogation was conducted. These are concerns which should further encourage this Court to make a most critical evaluation of the evidence upon the question of the confession's voluntariness.

II.

THE FAILURE OF THE POLICE TO ADVISE APPELLANT OF HIS RIGHTS BEFORE QUESTIONING HIM VIOLATED THE SPIRIT OF RULE 5 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, AND AN ORAL CONFESSION UNDER SUCH CIRCUMSTANCES SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE

(With respect to Point II, Appellant desires the Court to read the following pages of the transcripts: Tr. 16-21, 76, 110-12; T.Tr. 98; 1st T.Tr. 58.)

A. The Government Failed to Meet Its Burden of Showing That Appellant Was Advised of His Rights.

As stated previously, the record is silent as to whether Appellant was advised of his constitutional rights by the police and it should be presumed that he was not so advised. The interrogating detective's testimony throughout these proceedings nowhere indicates that such advice was ever given. When this case was here on appeal previously, the Court stated (116 U.S.App.D.C. 410, 324 F.2d 442):

> "A detective questioned him [Appellant] and got a confession while he was under arrest and lying wounded in a hospital. In keeping with the spirit of Rule 5(b), F.R. Crim.P., we might have expected that the detective would have warned him of his right to remain silent."

Miranda, decided subsequently to this Court's opinion in this case, leaves no doubt now that the burden is on the Government to show that advice was given, and that the advice and a waiver of the rights involved may not be presumed from a silent record. This point has been discussed in connection with the constitutional voluntariness of the confession, and need not be repeated here.

Since the Supreme Court has held that the burden is on the Government, both under the new right-to-counsel rule and under the voluntariness standard, there is no reason to believe that it should be otherwise under the Federal supervisory

standard. The Court has held that Rules 5(a) and (b) of the Federal Rules of Criminal Procedure are grounded upon Fifth Amendment policy and are "fundamental." Miranda v. Arizona, 384 U.S. 436, 463 (1966); Kent v. United States, 383 U.S. 541, 545, n.3 (1966).

The record does not show that Appellant was advised of his constitutional rights, and it must be reasonably inferred that if such advice had in fact been given the police officer would have adverted to it on one or more of the four occasions he testified. Therefore, it is submitted that this Court, which has this case still before it on direct appeal (since the Supreme Court vacated judgment at the time it remanded the case), has this additional independent ground for reversal of the conviction.

B. Advice As to Constitutional Rights Should Be Given By a Police Officer If It Cannot Be Given By a Judicial Officer.

In Rettig v. United States, 99 U.S.App.D.C. 295, 302, 239 F.2d 916, 923 (1956) (en banc hearing), two judges of the Court stated:

> "Another circumstance to be considered . . . in the event that it is shown that earlier arraignment was not possible, is whether the police have given the prisoner the benefit of the advisory statement which the committing officer would give under Rule 5(b)."

Elsewhere in their opinion, these judges stated:

> "The obvious benefit of Rule 5 is that the committing magistrate removes the accused from police control to the control of the jail warden, beyond the peril of secret interrogation and pressure. If delay in commitment is unavoidable, the danger inherent in continued police control may to some extent be mitigated by the police advising the accused of his rights and affording him the opportunity to consult counsel." 99 U.S.App.D.C. at 297 n.4, 239 F.2d at 918 n.4.

In Alston v. United States, 121 U.S.App.D.C. 66, 67-69, 348 F.2d 72, 73-75 (1965), two other judges of this Court expressed the view that the controlling element in the case was whether the accused, before giving a confession, had

been warned of his rights by police. Not only does the prisoner need this "basic information" about his rights, but

> "An interrogator who consciously withholds this information is not likely, in my estimation, to pursue his inquiries with the breadth of purpose and sensitivity to the objectives of Rule 5(a) which . . . justifications for limited post-arrest interrogation assume." 121 U.S.App.D.C. at 68, 348 F.2d at 74 (McGowan, J.).

In United States v. Townsend, 151 F.Supp. 378 (D.D.C. 1957), Judge Youngdahl found a "violation of the spirit of Rule 5" in the denial of counsel to an accused at a time when a commissioner was not available for a preliminary hearing. "If commissioners are unavailable, a delay may be necessary, but in such a case the police should advise the defendant of his constitutional rights." Id. at 385.

In the recent case of LaShine v. United States, D.C. Cir. No. 19,818, decided Jan. 24, 1967, slip op., pp. 3-5 n.3, the Court majority, in the context of a Rule 5 question, fully examined the evidence concerning such advice prior to an in-custody confession.

While an immediate hearing before a committing magistrate at which Appellant could have been advised of his rights was rendered impracticable because of his grave injuries, and hence delay was excusable, it was error for the Government to use in evidence police testimony of oral inculpatory statements which would have been inadmissible had a hearing before a magistrate been practicable at the time the statements were made. Either the police officer should have refrained from questioning the prisoner until he was in a condition which made it practicable to take him to a magistrate (see pp. 32-33, infra), or at the very least, the police officer should have undertaken himself to explain to Appellant the rudiments of his constitutional rights. His failure to adopt either course tainted the alleged oral confession.

C. The Prospective Nature of Miranda and Escobedo Does Not Preclude Application of a Requirement That the Police Give Advice of Constitutional Rights to the Accused.

Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) held unconstitutional the use of a confession obtained as the result of in-custody interrogation in which advice concerning the right to remain silent was not given and the suspect had requested and been denied an opportunity to consult with his lawyer. Miranda went one step further and required that, in addition to the Rule 5(b)-type advice on right to silence, possible self-incrimination, and right to retain counsel, 13/ an accused should, if necessary, be provided with counsel prior to any in-custody interrogation, unless the right to legal assistance is effectively waived. The Court was careful to point out in Miranda that the new constitutional standard was called forth by the same Fifth Amendment policy which had already received expression for a quarter of a century in the federal rules. 384 U.S. at 463 n.32. Rule 5 was thus recognized as requiring of federal courts the essence of the high standards only then being imposed in stricter terms upon state and federal courts alike. And federal courts, like state courts, "are still entirely free . . . to apply those standards in a broader range of cases than is required" by the Court's decision announcing that its Miranda and Escobedo rules would be applied prospectively. Johnson v. New Jersey, 384 U.S. 719, 733 (1966).

In Johnson, the Court expressed its concern with the possibility of serious disruption of the administration of criminal justice should the new right-to-counsel rule of Miranda be applied retroactively. It cited two prior Supreme

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13/ By amendment effective July 1, 1966, Rule 5(b) now gives an indigent the right to appointed counsel from the time of the preliminary hearing.

Court cases which "law enforcement agencies fairly relied on." Both of these cases involved right-to-counsel questions in state prosecutions: in one, the accused had at least been advised by the police of his right to remain silent; and in the other, the Court said it would have reversed had the case been federal. Id. at 731 and cases cited therein. This concern about retrospective application of a new and far-reaching national standard should not deter this Court from recognizing as a local, if not a general federal standard, a procedure which has long received general support (from the United States Attorney for the District of Columbia, as well as the courts) as being at the heart of Rule 5. See LaShine v. United States, D.C. Cir. No. 19,818, decided Jan. 24, 1967, slip op., p. 18-19 n.9 (dissenting opinion of Fahy, J.).

D. A Requirement That, at the Least, Advice of Rights Be Given By the Police in a Situation Such as This Was Clearly Foreshadowed in This Jurisdiction.

A requirement that advice of rights be given by a police officer in a situation such as this was clearly foreshadowed in this jurisdiction. The Pea, Rettig, Alston and Townsend cases, supra, decided in this Court and the District Court reflect the direction in which this jurisdiction has moved to effectuate fully the purpose of Rule 5(b). These cases recognize expressly or tacitly that even if the delay in bringing the accused before a magistrate is not otherwise "unnecessary" within the meaning of Rule 5(a), the purpose of Rule 5(b) is subverted if a police officer uses the occasion to induce the suspect to incriminate himself without full knowledge of his rights.

Several other cases, while characterizing the evidence in a variety of ways, suggest a farther-reaching holding than is required for this case.

In Mitchell v. United States, 114 U.S.App.D.C. 353, 356, 316 F.2d 354, 357 (1963), this Court stated:

> "Moreover, '[i]f because of some extraordinary circumstance no magistrate were available, it would not follow that questioning could continue.' Coleman v. United States, 114 U.S.App.D.C. 185, 313 F.2d 576 (1962). Pending a hearing before a magistrate who informs the suspect of his rights, the police may not 'carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.' Mallory v. United States, supra, 354 U.S. at 454 . . . ."

See also United States v. Middleton, 344 F.2d 78, 81-82 (2d Cir. 1965).

Most recently, in LaShine v. United States, D.C. Cir. No. 19,818, decided Jan. 24, 1967, slip op., pp. 16-17 (dissenting opinion), Judge Fahy stated:

> "Where the issue as here is the admissibility of a confession Rule 5 of the Federal Rules of Criminal Procedure should be construed in the circumstances to require that appellant should have been taken before a magistrate without unnecessary delay if it were practicable to take him before a magistrate. If it were not practicable then a confession elicited by police interrogations comes within the logic of the Mallory rule. The fact that appellant was confined by Maryland on a Maryland charge well might have rendered impracticable a hearing before a magistrate, but this conferred no rights on the government to use in evidence confessions which would have been inadmissible were a hearing before a magistrate practicable."

The majority of the Court in LaShine did not squarely face the issue. See slip opinion, pp. 9-10 n.8. See Greenwell v. United States, 119 U.S.App.D.C. 43, 336 F.2d 962 (1964); Queen v. United States, 118 U.S.App.D.C. 262, 335 F.2d 297 (1964); Spriggs v. United States, 118 U.S.App.D.C. 248, 335 F.2d 283 (1964); Ricks v. United States, 118 U.S.App.D.C. 216, 334 F.2d 964 (1964).

In the last-cited case, a confession was obtained from an accused who had been committed to jail after a preliminary hearing was continued solely for his benefit - to obtain counsel. The confession was excluded, because "Ricks' right to counsel did not depend on a race with the police. The police activities here violated the general scheme of the Federal Rules of Criminal Procedure . . .,'

and called for exercise of the Court's "local supervisory power." 14/ 118 U.S. App.D.C. at 222, 223, 334 F.2d at 970, 971. (Emphasis added.)

The same result was reached in Queen v. United States, supra, which presented substantially the same factual situation as did Ricks, except that the accused was free on bail at the time a policeman questioned her while awaiting reappearance before the U.S. Commissioner.

Even in cases in which the Court has decided that Rule 5 was not violated, the importance of police warnings has been recognized. See, e.g., Long v. United States, 119 U.S.App.D.C. 209, 338 F.2d 549 (1964); Proctor v. United States, 119 U.S.App.D.C. 193, 338 F.2d 533 (1964). 15/

Behind the increasingly high standards derived from Rule 5 is an awareness that the rule reflects the policy of the Fifth Amendment - a conclusion explicitly confirmed in Miranda. This Court had already expressed this concern for protecting the rights of an accused from pretrial subversion through self-incriminating confessions made without proper knowledge of the consequences. The Court has pointed out that a basic change in the relationship and status of the parties occurs when a subject is arrested, and that the process then becomes accusatorial rather than inquisitorial, placing the accused in the legal custody of judicial officers. See Greenwell v. United States, supra,

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14/ "[I]t is the function of this court 'to formulate rules of evidence appropriate for the District, so long as the rules chosen do not offend statutory or constitutional limitations.' Griffin v. United States, 336 U.S. 704 . . . ." Wright, J., concurring in Killough v. United States, 114 U.S.App.D.C. 305, 315, 315 F.2d 241, 251 (1962).

15/ In other cases the Court found police warnings to be an inadequate substitute for judicial advice where there was no good reason for delay in arraignment. E.g., Greenwell v. United States, 119 U.S.App.D.C. 43, 46, 49, 336 F.2d 962, 965, 968 (1964); Spriggs v. United States, 118 U.S.App.D.C. 248, 250, 335 F.2d 283, 285 (1964). See also Alston v. United States, 121 U.S. App.D.C. 66, 67, 348 F.2d 72, 73 (1964)(opinion of Bazelon, C.J.); Trilling v. United States, 104 U.S.App.D.C. 159, 173 n.13, 260 F.2d 677, 691 n.13 (1958)(concurring opinion of Bazelon, J., joined by Edgerton, C.J.).

119 U.S.App.D.C. at 47, 336 F.2d at 966; Spriggs v. United States, supra, 118 U.S.App.D.C. at 251-52, 335 F.2d at 286-87; Ricks v. United States, supra, 118 U.S.App.D.C. at 221, 334 F.2d at 969; Killough v. United States, 114 U.S. App.D.C. 305, 311, 315 F.2d 241, 247 (1963)(en banc).

A clearly foreshadowed result of this case law is the exclusion of a confession obtained, as in this case, where the police have not even advised the accused - in the custody of police - of his rights before an interrogation designed to elicit incriminating statements.

It is significant that for at least two years before Appellant was questioned, the Metropolitan Police Department of the District of Columbia was aware of its duty to inform a suspect of his rights before interrogation. On this point, the then United States Attorney Oliver Gasch testified before a Senate subcommittee:

> "Now on the question of safeguarding individual rights, I have suggested to the police as recently at [sic] last week, when I met with a group of 200 detectives and certain supervisory officials in the Police Department, that a person arrested prior to any interrogation as to the facts and circumstances of the case should be warned that he is not required to make a statement and any statement he makes might be used against him. I understand that is the practice in England; and it is also the practice in some of our States. I believe that basic fairness, the rules of fair play, would indicate that type of warning, and I have advocated that, although the Supreme Court, in the Mallory decision, did not specifically say that that was required, and I believe that from this time henceforth such a suggestion on my part will be adopted by the police." 16/

Furthermore, in a lecture to police officers, the United States Attorney and an Assistant United States Attorney emphasized the necessity of giving warnings

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16/ Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. 108 (1958). See transcript of the U.S. Attorney's lectures to police officers, reprinted in Hearings on H.R. 11477 et al. Before a Subcommittee of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. 397-98, 408, 411, 412, 419 (1958).

"very carefully" to a suspect in a hospital, and even questioned whether arraignment should be provided at the hospital before interrogation. Hearings on H.R. 11477, supra at 411.

E. Plain Error Was Committed by Admitting Into Evidence a Confession Which at Trial Was Highly Prejudicial to Appellant.

Although the Rule 5 point was not pressed below, the admission into evidence of the police testimony concerning Appellant's incriminating statements was plain error of which this Court can take account under Rule 52(b) of the Federal Rules of Criminal Procedure. Use of the illegally-obtained confession was highly prejudicial to Appellant. There were no eyewitnesses to the circumstances of the shootings; Appellant testified at trial that his wife shot him first. Under these circumstances, the statements contained in the confession were obviously damaging to Appellant.

CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed and the case remanded for a new trial without the use of Appellant's confession.

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(By Appointment of this Court)

February 2, 1967

APPENDIX

Constitution and Rule Involved

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 5, Federal Rules of Criminal Procedure.*

Proceedings Before the Commissioner

(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

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* Effective at date of Appellant's arrest and interrogation. Rule 5(b) was amended, effective July 1, 1966.

CERTIFICATE OF SERVICE

I, J. Laurent Scharff, hereby certify that I have this 2nd day of February 1967, hand-delivered a copy of the foregoing Brief for Appellant Emanuel Pea, Jr. to:

Frank Q. Nebeker, Esq.
Assistant United States Attorney
United States Courthouse
Washington, D. C.

J. Laurent Scharff

1/17/68
(2)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,433

EMANUEL PEA, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
EDWARD T. MILLER,
Assistant United States Attorneys.

Cr. No. 701-60

QUESTIONS PRESENTED

After appellant's conviction had been affirmed by this Court it was vacated by the Supreme Court and remanded to the District Court on a mandate to conduct further proceedings not inconsistent with the decision in *Jackson* v. *Denno*, 378 U.S. 368 (1964) decided that same day. That hearing was conducted on July 1, 1966 by a judge assigned in place of the incapacitated trial judge who determined on the record before him that the statement appellant had given was voluntary. On this appeal from that determination, in the opinion of appellee, the following questions are presented:

1. Did the proper scope of the hearing on mandate extend beyond a determination of the voluntariness of appellant's statement so that the additional claims may properly be presented on this appeal that a) the statement was used in violation of the *Mallory* Rule and b) the statement was inadmissible absent proof that appellant was warned of his rights without regard to the issue of voluntariness? If so, does the record in this case show a violation of the *Mallory* Rule or other police misconduct which would justify reversal?

2. On this appeal from the hearing judge's determination, does the scope of the record to be reviewed properly include sections from a deposition which were *dehors* the record or testimony cited from transcripts of prior proceedings related to the cause which were not offered or utilized at the hearing, absent a showing at the hearing that the witnesses were unavailable a claim that the hearing was inadequate or unfair?

3. Applying the proper standard—*i.e.*, whether the hearing judge's finding was "clearly erroneous" when measured against the facts in the applicable record—does the record in this case support the hearing judge's finding that under all the circumstances appellant's incriminating statement was voluntarily made?

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*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20433

EMANUEL PEA, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed in the District Court on August 22, 1960, appellant was charged in two counts with first degree murder (22 D.C. Code § 2401) and assault with a dangerous weapon (22 D.C. Code § 502). He was convicted on February 7, 1963 of second degree murder and of the assault as charged after a five day trial to a jury before Judge George L. Hart. On March 15, 1963 he was sentenced to concurrent terms of imprisonment for

fifteen years to life on the murder count and forty months to ten years on the assault count.

Appellant had previously been convicted under the same indictment and sentenced to death. This Court on July 11, 1962, however, vacated the original judgment of the district court and remanded the case for a new trial on the ground that appellant had been represented by one "L. A. Harris", a fraudulent imposter-lawyer (Appeal No. 16,387).

Appellant's second conviction was affirmed by this Court on October 10, 1963. 116 U.S. App. D.C. 410, 324 F.2d 442. However, his petition for a writ of *certiorari* having been granted, the judgment of this Court was vacated by the Supreme Court on June 22, 1964, and the cause was remanded for further proceedings not inconsistent with that Court's opinion in *Jackson* v. *Denno,* decided that same day. 378 U.S. 368. After a series of continuances caused by appellant's need to obtain evidence not immediately available and the illness of appellant's counsel and the trial judge, then Chief Judge Matthew F. McGuire on June 7, 1966 ordered the case transferred to another judge and Judge William B. Jones was assigned to conduct the evidentiary hearing which took place on July 1, 1966.

As the facts are necessarily detailed in the arguments which follow, only the salient facts are here outlined. On the evening of June 28, 1960 appellant's wife died as the result of two bullet wounds received in the unit block of Eye Street, Northwest. A bystander also was injured by a bullet in the thigh. Various witnesses observed aspects of the incident. And when the police arrived, they found appellant leaning on a parked car with a gun at his feet. He was taken to nearby Sibley Memorial Hospital where Detective Edwin Coppage of the Metropolitan Police Homicide Squad found him, after having briefly visited the scene of the crime where he observed the bleeding form of a Negro female on the ground and was shown by a police officer the small gun which allegedly

belonged to the suspect and had been used in the shooting. (Tr. 14-15.) When he arrived at 10:53 p.m. he found appellant being examined in the emergency room of the hospital. He obtained permission from the attending physician to speak with appellant and in the course of his brief interview obtained the statement whose voluntariness is now in question (Tr. 16-18). The detective testified that he told appellant that he was a police officer, asked him his name and where he lived and that he then told appellant that he had been told that appellant had shot his wife in the unit block of I Street (Tr. 19). Appellant admitted shooting his wife and himself, as well (Tr. 19). Detective Coppage testified that he then asked appellant "what had happened, what had led up to this shooting" and that appellant narrated in substantial detail the events of earlier that evening (Tr. 20).

Appellant related that he had borrowed a car from the company where he worked as a lot boy and picked up his wife, from whom he was separated, and the children for a ride to Arlington and a visit with friends. Later that evening, they returned to the District, stopped to buy some french-fried potatoes for the children, and then returned to the unit block of I Street where he sat in the car trying to talk his wife into coming back to live with him. When his wife concluded the conversation and started to take the children into the house, he got out, took the gun he had had all evening from his pocket, and as she started to walk away, exclaimed "Die and be damned," and shot her the first time. She started to run, and he fired several more shots. Then the children began to scream. And unnerved, he put the gun to his own head and fired. (Tr. 20-21.)

At the close of the interview and with the permission of the doctor appellant was then moved by ambulance to D.C. General Hospital where there were facilities to guard him. They arrived at about 11:30 or 11:45 p.m. and appellant was taken immediately to the emergency room where he was again examined (Tr. 26). After in-

forming the police officer on duty at the hospital of appellant's presence and without conferring with the hospital authorities, Detective Coppage departed, having spent only about ten minutes at the hospital (Tr. 27).

Also appearing at the hearing by deposition was Dr. Carlos Mena Diaz, who was chief resident neurosurgeon at D.C. General Hospital on the night in question and who had examined appellant (Tr. 52-53). Appellant himself testified, but only to claim that he had no recollection of having seen or spoken to Detective Coppage prior to the coroner's hearing (Tr. 61). Defendant's Exhibit No. 1, the Sibley Hospital record of appellant's admission on June 28, 1960, and defendant's Exhibit No. 2, the D.C. General Hospital record relating to appellant's admission and treatment between June 28 and August 1, 1960, were stipulated into evidence to be used for any purpose the judge might deem correct (Tr. 43-45). Appellant's counsel represented at the hearing that he had located the Dr. Tan who was the attending physician at Sibley Hospital, but that the doctor had no recollection apart from the Sibley Hospital Record of the relevant events at that hospital (Tr. 39). He also had been unable to locate a Dr. Colletti who had apparently examined appellant at D.C. General Hospital and signed the report (Tr. 39-41).

In a written opinion filed July 11, 1966, Judge Jones made his findings and concluded that appellant's confession was voluntary and therefore admissible. From that determination this appeal has been taken.

RULE INVOLVED

Rule 5(a)(b), Federal Rules of Criminal Procedure, provides:

> (a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without un-

necessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

SUMMARY OF ARGUMENT

I

Appellant's contention that his confession was obtained and admitted into evidence in violation of the *Mallory* Rule is not properly before this Court. It was not presented to this Court on the appeal which affirmed his conviction or to the Supreme Court. The evidentiary hearing conducted on mandate from the Supreme Court pursuant to that Court's decision in *Jackson* v. *Denno* was limited in scope to the issue of whether appellant's confession was voluntary. But even though appellant made reference to a possible violation of the *Mallory* Rule at that hearing, his present contention is without merit. Since appellant's trial had begun prior to June 13, 1966 the trial judge correctly ruled that *Miranda* had no application to the hearing.

But the facts also show the contention is without merit. The record shows that appellant was taken immediately

to the hospital from the scene of the crime where after shooting his wife he put a bullet into his own head. The investigating officer arrived shortly afterwards, having learned at the scene of appellant's whereabouts but virtually nothing about the circumstances of the crime. He did not speak to appellant until he had obtained permission from the attending doctor who was examining appellant when he arrived. The short five minute interview, carried on in a normal tone of voice, consisted mostly of a narrative by appellant after an initial question by the detective. Appellant showed no reluctance to talk, no pain, no difficulty in breathing, and he was logical and coherent. The attending doctor, two nurses, and two other police officers were also present in the hospital emergency room for the duration of the interview. There was thus no delay not dictated by medical necessity nor any suggestion for secret interrogation for the purpose of extracting a confession. The absence of a clear showing that the detective warned appellant of his constitutional rights, under the circumstances of this case, does not show a violation of the *Mallory* Rule which necessitates reversal of appellant's conviction. *Escobedo* is distinguishable on its facts.

II

At the remand hearing on the mandate from the Supreme Court the sole issue before the trial judge was the voluntariness of the confession. He correctly ruled that his determination would not be made on the whole voluminous record of the prior proceedings, but on the evidence to be adduced before him. For this purpose the transcripts of prior testimony could be freely utilized to refresh the recollection or to impeach the testimony of witnesses. Appellant made no showing that witnesses were unavailable so that he needed to introduce their prior testimony. Nor has he complained of any restraint on his right to introduce evidence or to cross-examine or that he was denied an adequate and fair hearing. Thus, he may not properly refer to testimony from the prior proceedings in this cause or *dehors* the record to question the

correctness of the findings by the hearing judge on the evidence presented to him. Moreover, the resolution of disputed facts was peculiarly within the competence of the trial judge. On review, this Court should accept his findings as to disputed facts on the record made at the hearing and should sustain his findings that appellant's statement was voluntary unless it has been shown on that record to be "clearly erroneous."

III

The totality of the circumstances disclosed by the record shows that appellant gave his statement whose voluntariness is in question while he was lying with a bullet wound in his head in the emergency room of a hospital under the scrutiny of the attending physician and with two nurses and two other police officers as well as the investigating officer present. There was clearly no opportunity and the record discloses no attempt to apply pressure upon him to extract a confession. Nor is there any showing that in the absence of such pressure which must be weighed against his power to resist, his condition itself made his statement involuntary. Despite the apparently seriousness of his wound, and the fact that he was blinded in one eye by the bullet, he suffered no brain damage. He showed no signs of pain or intoxication or difficulty in breathing at the time he was interviewed. And he gave without difficulty an apparently spontaneous, detailed and coherent narrative to the detective, who was ignorant of the circumstances of the crime and who could recall having used a very few leading questions. The fact that appellant's coherence deteriorated and intoxication became apparent after his transfer from Sibley Hospital to D.C. General Hospital and after the lapse of a substantial amount of time does not affect significantly the credibility of the testimony that at the time he gave the statement he was coherent and in control of his faculties. In any event the actual effect of the injury and possible intoxication at the time of the statement were questions of

fact for the trier and the hearing judge's finding on this record under the totality of circumstances the confession was voluntary was surely not "clearly erroneous."

ARGUMENT

I. Even if the issue were properly before this Court, there was no violation of the *Mallory* Rule which requires reversal of appellant's conviction.

(Tr. 10-11, 14-23, 25-27, 31-34, 36, 38, 46, 48-49, 75, 110-11)

At the threshhold, appellee submits, appellant's contention that his confession was obtained and admitted into evidence in violation of the *Mallory* Rule is not properly before this Court.[1] The issue was disclaimed in the appeal to this Court which affirmed appellant's conviction.[2] It was not presented to the Supreme Court.[3] It therefore was not an issue properly to be considered by the

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[1] *Mallory* v. *United States*, 354 U.S. 449 (1954). There is no basis whatever for the application of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) as the Supreme Court has required only prospective application of that decision and the facts in the instant case are utterly distinguishable from those in *Escobedo*. *Johnson* v. *New Jersey*, 384 U.S. 719 (1966). At the hearing the trial court correctly ruled that *Miranda* and *Escobedo* were not applicable to the hearing. See *LaShine* v. *United States*, No. 19,818, D.C. Cir., January 24, 1967; *Stith* v. *United States*, No. 20,007, D.C. Cir., January 24, 1967.

[2] In appellant's brief in No. 17,824 he raised the issues of voluntariness and sufficiency of corroboration. He said "This does not concern the *Mallory-McNabb* situation. . . . ." Brief of Appellant, p. 19. After an appeal from a conviction and judgment is affirmed, the affirmance covers not only questions actually raised but also the questions that might have been raised. *Callanan* v. *United States*, 274 F.2d 601, 605 (8th Cir. 1960), *affirmed*, 364 U.S. 587 (1961).

[3] Appellant framed the issue presented to the Supreme Court as follows: "Is the admission of an oral confession into evidence constitutionally proper when admittedly obtained under circumstances negating its voluntary character, reliability and truthfulness". Appellant's Petition for Writ of Certiorari, p. 2.

Trial Court on remand for an evidentiary hearing to determine the issue of voluntariness in accordance with *Jackson* v. *Denno*, 378 U.S. 368 (1964).[4] A further justification for appellee's position is that it has long been settled that the question of whether there has been "unnecessary delay" in taking an accused person before a judicial officer is properly resolved without consideration of whether or not the statement obtained was voluntary. *Mallory* v. *United States, supra; Spriggs* v. *United States,*

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[4] The trial court considered the inquiry so limited (Tr. 10-11). The mandate of the Supreme Court remanded the case to the District Court for further consideration and findings on the issue of voluntariness in a manner not inconsistent with the Court's decision in *Jackson* v. *Denno, supra.* "The mandate required the execution of the decree. The District Court could not vary it or give any further relief." *Kansas City So. Ry.* v. *Guardian Trust Co.*, 281 U.S. 1 (1930); see *In re Sanford Fork and Tool Co.*, 160 U.S. 247, 255 (1895). *Cf. Lee Shaw* v. *Brownell*, 219 F.2d 301 (9th Cir. 1955) (improper execution of mandate resulted in remand for compliance). See generally *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, § 445 (*Wolfson and Kurland, rev. ed.* 1951); *2A Moore, Federal Rules of Practice*, §§ 59.16, 3914-15 (2d ed. 1966). Compare *Greenwell* v. *United States*, 119 U.S. App. D.C. 43, 45 n.1, 336 F.2d 962, 964 n.1 (1964) (Court reserved *Mallory* issue pending remand for findings on unrelated issue); *McLindon* v. *United States*, 117 U.S. App. D.C. 283, 329 F.2d 238 (1964) (jurisdiction retained by the Court to dispose of appeal after remand) with *Felton* v. *Spiro*, 78 F.576 (6th Cir. 1897) (Cause is remanded for further proceedings from the point where the error was committed; remainder of trial which is without error will not be disturbed). Accord, *Roberts* v. *United States*, 325 F.2d 290 (5th Cir. 1963). See generally *6A Moore, Federal Rules of Practice*, §§ 59.06, 3766-67 (2d ed. 1966). In the instant case, appellee submits, the Court by affirming did not retain jurisdiction to consider the *Mallory* issue which, had it been preserved at trial, should have been considered on that appeal. It is clear that at the hearing appellant understood that the issue before the court was the voluntariness of appellant's confession (Tr. 75). He did, however, make reference to a *Mallory* issue, although his purpose was not entirely clear. See *LaShine* v. *United States, supra*, slip opinion at 2 n.1. The government's position at the hearing was, and on this appeal continues to be, that a possible violation of Rule 5, Fed. R. Crim. P., was not an issue to be resolved at the hearing. (Tr. 110). The prosecutor also correctly observed that the issue had not been pursued at trial or on the subsequent appeal (Tr. 111).

118 U.S. App. D.C. 248, 335 F.2d 283 (1964); *Rettig* v. *United States*, 99 U.S. App. D.C. 295, 297-98, 239 F.2d 916, 918-19 (1956) (Opinion of Bazelon, J.).[5]

In any event appellant's *Mallory* contention is without merit.[6] Not every delay, of course, is an unnecessary delay, and "[c]ircumstances may justify a brief delay between arrest and arraignment." *Mallory* v. *United States*, *supra* at 455. However, no "unnecessary delay" appears on this record. The testimony at the evidentiary hearing discloses no delay in taking appellant to the hospital and no statement by appellant except the one directed to Detective Coppage. (Tr. 15). When Detective Coppage of the Homicide Squad arrived at the hospital minutes later, having just visited the scene of the crime just long enough to learn where appellant had been taken, the detective knew nothing about the circumstances preceding the crime (Tr. 14-16, 21). Appellant was lying on an examination table in the hospital's emergency room being examined by a doctor (Tr. 18). Though technically under arrest, according to Detective Coppage, the deference shown by the detective, in particular, and the other relevant circumstances show that the medical authorities and not the police were in control at the time appellant's statement was made (Tr. 17-18). There is no showing that there was

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[5] It is also well settled—and in its general form a rule of everyday application—that the burden of showing an unreasonable delay in presentment contrary to Rule 5 rests on appellant. See *Trilling* v. *United States*, 104 U.S. App. D.C. 164 n. 10, 166, 260 F.2d 677 (*en banc* 1958). The burden of showing voluntariness, however, rests upon the prosecution. This forms another possible ground for suggesting that in light of the purpose of the mandate hearing the two issues were discrete.

[6] Though the issue of voluntariness does not bear on the resolution of a *Mallory* issue, many of the same factors which are relevant to the *Mallory* issue shed light on the totality of circumstances within which appellant's claim of voluntariness must be considered. Hence appellee believes this somewhat more extensive treatment than might otherwise be warranted is appropriate. See *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 259 F.2d 943 (1958), *cert. denied*, 359 U.S. 959 (1959).

any "unnecessary delay" to permit the five minute interview which followed as soon as the detective sought and obtained permission from the doctor who was treating appellant to speak to him (Tr. 18, 20). It does not even appear from the record that treatment was interrupted, for none was given or attempted during or apparently after the interview until appellant was transferred to D.C. General (Tr. 23).

At the outset of the interview the detective identified himself as a police officer and stated that he had been told that appellant had shot his wife (Tr. 19, 49). Appellant responded to this initial inquiry without apparent reluctance and with a detailed, logical and convincing narrative of the events preceding the crime (Tr. 20-22).[7] He was coherent, was breathing normally, and was in no apparent pain (Tr. 22-23, 27). The detective recalled asking few leading questions requiring yes-or-no answers. There was no hint of "grilling." (Tr. 21).[8] There was no semblance of secrecy. The interview was conducted in a normal tone of voice (Tr. 19, 22-23). Appellant spoke without difficulty (Tr. 27). The doctor who had been examining or treating appellant, two nurses, and the two police officers were present in the hospital's moderate-sized emergency room throughout (Tr. 16, 19-20). After the interview, the doctor approved Detective Coppage's request that appellant be transferred to D.C. General Hos-

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[7] Appellee submits that considering the circumstances of this case, the seriousness and recency of the offense when the statement was made, the lack of knowledge of the detective, and the nature of appellant's wound, there may well have been an urgency to the detective's inquiry which exhalted the purpose of investigation to obtain substantive information immediately while available over a calculated attempt to exploit appellant's condition in order to extract the confession of a man of whose guilt he was convinced solely for the purpose of a subsequent persecution.

[8] In fact, when viewed with the knowledge that immediately after he shot his wife appellant shot himself in the head, the picture is of a person unburdening himself of his guilt, not one whose resistance has been overcome. See *Porter* v. *United States*, 103 U.S. App. D.C. 385, 395, 258 F.2d 685, 695, *cert. denied*, 360 U.S. 906 (1958) (dissenting opinion of Bazelon, J.).

pital where security facilities were available. Though Detective Coppage accompanied appellant to D.C. General Hospital during the short ride in the ambulance at the request of the ambulance attendants, he asked no further questions. (Tr. 25-26). And having seen that appellant was being examined, he departed D.C. General Hospital immediately after informing the police officer on duty of appellant's presence (Tr. 27, 34, 36, 38, 46).

It is settled that the *Mallory* Rule does not exclude spontaneous or threshhold confessions after arrest.[9] *Spriggs* v. *United States, supra; Naples* v. *United States,* 113 U.S. App. D.C. 281, 307 F.2d 618 (1962). The strictest application of Rule 5(a), see *Greenwell* v. *United States, supra; Alston* v. *United States,* 121 U.S. App. D.C. 66, 348 F.2d 72 (1965), was not violated here where delay in presentment was manifestly attributable solely to medical necessity, appellant's presence in the hospital emergency room where he was interviewed was not attributable to improper police conduct, and no opportunity for extracting a confession by a process of secret interrogation was created. Compare *Spriggs* v. *United States, supra.* Appellant himself concedes that this delay was excusable (Brief of appellant, p. 30). There was even no initial denial or apparent reluctance to talk to cast doubt upon its admissibility as a spontaneous or threshhold statement (Tr. 19-22). Compare *Spriggs* v. *United States, supra,* with *Proctor* v. *United States,* 119 U.S. App. D.C. 193, 338 F.2d 533 (1964), *cert. denied,* 380 U.S. 917 (1965).[10]

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[9] There is no noteworthy distinction between spontaneous and threshold confessions. See *e.g., Spriggs* v. *United States, supra.* To qualify, however, statements must not have been made after unnecessary delay, not as determined by watching the clock, but by ascertaining whether any challenged time lapse "was utilized to obtain a confession by 'secret police interrogation' after arrest and prior to a magistrate's hearing." Id. at 251. The focus is on the purpose for police conduct resulting in delay in presentment. *Spano* v. *New York,* 360 U.S. 315, 324 (1959); *Trilling* v. *United States, supra.*

[10] The mere fact that a confession is made in police custody, if apellant was actually in such custody at the pertinent time does

The need for some investigative inquiry addressed to suspects and accused persons has always been recognized.[11] *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963); *Heideman* v. *United States, supra;*[12] *Naples* v. *United States, supra;* accord, *United States* v. *Middleton*, 344 F.2d 78, 82-83 (2d Cir. 1965). Whatever foreshadowing of *Miranda* there might have been, a police warning of constitutional rights has never been the *sine qua non* of admissibility of confessions. See *e.g.*, *Trilling* v. *United States, supra;*[13] *Luckett* v. *United States*, No. 19,911, D.C. Cir., July 12, 1966 (affirmed by order). *Cf. Stith* v. *United States, supra.* Since appellant's trial began long before June 13, 1966, the admissibility of the statement was not contingent upon proof of the warning

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not render it inadmissible. *Mitchell* v. *United States*, 322 U.S. 65 (1944); *Spriggs* v. *United States, supra;* see also *Porter* v. *United States, supra* (dissenting opinion of Bazelon, J.). In effect, however, appellant was insulated from secret interrogation and pressure by his removal from police control to the custody of the hospital, one of the recognized benefits of Rule 5(a). See *Rettig* v. *United States, supra* at 297 n.4, 239 F.2d at 918 n.4 (opinion of Bazelon, J.).

[11] In his dissent in *Trilling* at 173 n. 13, 260 F.2d at n. 13, then Judge Bazelon noted that that appellant had not been warned of his right to remain silent until after his oral confession, which followed initial denials.

[12] For instance, "Where the ultimate reliance is upon self-defense, the telling of the story to the police promptly after the event may go far towards persuading the jury to believe that it was not fabricated long after the fact." *Alston* v. *United States, supra* at 68, 1348 F.2d at 74 (opinion of McGowan, J.). The fact that Detective Coppage had virtually no knowledge of the circumstances of the crime when he began the interview and the manner of his inquiry suggest that his purpose was not limited to the elicitation only of damaging admission. Ibid.

[13] This need cited in *Heideman* has been acknowledged for example, by Judge Fahy in *Spriggs* v. *United States, supra* at 252 n. 7, 335 F.2d at 287 n. 7, and by Judge Wright in *Greenwell* v. *United States, supra* at 45 n. 3, 336 F.2d at 964 n. 3. See also *Spriggs* v. *United States, supra* at 251-52 n. 7, 335 F.2d at 286-87 n. 7; *Trilling* v. *United States, supra* at 170, 260 F.2d at 688 (opinion of Bazelon, J.)

prescribed in *Miranda*.[14]

Furthermore, the effectiveness of police warnings has often been questioned and have been held to be "of little consequence" even where unnecessary delay is extremely short if there have been initial denials. *Spriggs* v. *United States, supra; Greenwell* v. *United States, supra;* see *Alston* v. *United States, supra* (opinion of Bazelon, C. J.); *Rettig* v. *United States, supra* at 297 n. 4, 239 F.2d at 918 n. 4 (opinion of Bazelon, J.) (danger of continued police control where magistrate not available may to some extent be mitigated by police warning).[15] However, the absence of a warning, where consciously withheld, if there has been even a short delay and an initial denial, may be the crucial factor. See *Alston* v. *United States, supra* (concurring opinion of McGowan, J.).

The record itself clearly permits the inference, but still does not establish directly and unequivocally, that Detec-

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[14] In light of the prospective affect of the *Miranda* requirements regarding warnings to accused persons and the rationale expressed in *Johnson, supra* at 730-32 for not prescribing retroactive application of the *Miranda* decision to state convictions based on confessions obtained without warnings of the right to counsel or against self-incrimination, as well as the date of the events now subject to question in this case, appellee submits that there is not a compelling need for reversal of this conviction unless, of course, the Court is not satisfied that the confession was voluntary. Proper police conduct under similar circumstances in the future is now explicitly prescribed and is no longer subject to question, and the circumstances of this case, in appellee's opinion, discloses no illegal detention and thus there were no fruits of wrong-doing reaped from it. This was clearly no calculated unfairness or exploitation by the police. See *United States* v. *Mitchell*, 322 U.S. 65 (1944). *Cf. Griffin* v. *Illinois*, 351 U.S. 12, 25-26 (1956) (concerning opinion of Mr. Justice Frankfurter); *Couch* v. *United States*, 98 U.S. App. D.C. 292, 235 F.2d 519 (1956, *en banc*); *Durham* v. *United States*, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954).

[15] Consider the minimal warning and the circumstances described in *Naples* [*II*] v. *United States*, 120 U.S. App. D.C. 123, 125, 344 F.2d 508, 510 (1964); and the probable effect of the warnings under the circumstances in *Fikes* v. *Ala*, 352 U.S. 191, 193 (1957) (multiple warnings to suggestible, possibly mentally ill defendant of low mentality).

tive Coppage did not warn appellant of his constitutional rights. The inference must be made from the detective's testimony that he had related to the court all of the conversation that he could recall and the absence from that testimony of any statement that he had warned the appellant of his rights (Tr. 19, 33, 48-49). He was never asked about a warning directly, however. But even assuming, *arguendo*, that appellant was not warned, the deficiency, under the peculiar circumstances of this case which involved no delay not required by medical necessity and no opportunity for secret interrogation contrived by the police, does not, in appellee's opinion, constitute a violation of the *Mallory* Rule which would require reversal. See, *LaShine* v. *United States*, *supra*, in light of the dissenting opinion of Fahy, J., slip opinion at pp. 18-19 n. 9; *Luckett* v. *United States*, *supra*. *Cf. United States* v. *Robinson*, 354 F.2d 109 (2d Cir. 1965, *en banc*), *cert. denied*, 384 U.S. 1024 (1966); *United States* v. *Cone*, 354 F.2d 119 (2d Cir. 1965, *en banc*), *cert. denied*, 384 U.S. 1023 (1966).

II. Review by this Court of the determination after hearing on mandate that appellant's statement was voluntary should be reviewed on the competent evidence adduced at that hearing and the determination should be sustained unless "clearly erroneous."

(Tr. 10-11, 59; Trial Tr. 63-81, 279-80, 305-07, 405-07)

At the remand hearing under the Supreme Court's mandate the issue before the trial judge, who had not presided at the trial, was limited to "whether or not the purported confession given at Sibley Hospital . . . was a voluntary confession." (Tr. 10-11). *Cf. Coor* v. *United States*, 119 U.S. App. D.C. 259, 340 F.2d 784 (1964). The judge ruled, correctly in appellee's opinion, that while he had made a quick review of the record of the prior proceedings, he would make his determination on the evi-

dence adduced before him, and not on the transcripts of the prior proceedings, which, however, could be freely used to refresh the recollection or to impeach the testimony of any witnesses brought before him. (Tr. 10-11.)

By ruling that the hearing was to be conducted "just as though today were the day we are trying the case," he put himself in a position close to that of the trial judge who, before hearing Detective Coppage, at appellant's trial had heard only the testimony of the coroner and an eyewitness, which was not relevant to the issue of voluntariness, and the testimony of a police officer who had been on the scene and who had given a limited description of appellant's condition when he was first discovered and sent to the hospital (Trial Tr. 63-81). Appellant never attempted to show the unavailability of any witness in order to justify introduction of prior testimony from the earlier proceedings. See *Bentvena* v. *United States*, 319 F.2d 916, 941 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963).

Under such circumstances, in appellee's opinion, appellant may not properly rely as he has in his brief on testimony not of record in the proceedings on mandate. For instance, appellant's counsel specifically elected not to introduce a portion of the deposition of Dr. Mena taken for the purpose of the mandate hearing (Tr. 59). Appellant concedes that a portion of that deposition to which he has made reference was never introduced into the record of the hearing (Brief for Appellant, pp. 14, 23). Thus, that reference is to hearsay, *dehors* the record.

Likewise, the government's right of cross-examination is seriously infringed by appellant's reference to the content of the prior testimony of the chief psychologist at St. Elizabeths Hospital, who testified that she had examined and tested appellant some three months after he had made his statement (*Ibid.*, 16, 23). The competence and probative value of that testimony was contested at trial, and in addition, it is now offered for an apparently different purpose from that for which it was originally offered in the earlier proceeding (Trial Tr. 279-80, 305-07, 405-07).

Similarly, references to appellant's schooling and Detective Coppage's testimony at appellant's first trial might well have been made through witnesses and by means of cross-examination from the pertinent transcript. But such materials should not now be used when the chance to object and to explain has passed. In the absence of any claim or showing that material witnesses were unavailable, that appellant was restricted in his introduction of pertinent evidence or right to cross-examine, or that the hearing was inadequate, the review by this Court should be of the hearing judge's determination on the evidence he had before him. *Cf. Townsend* v. *Sain,* 372 U.S. 393 (1963); *LaShine* v. *United States, supra* at 8 ("[W]hether *on the record made at the hearing,* the judge demonstrably erred in finding that exclusion was not dictated . . . ." (emphasis supplied)).

The review by this Court is not, as appellant suggests, in the nature of a *de novo* determination. On remand, "in order to provide a record adequate for appellate review on the issue of voluntariness, the trial judge must resolve any disputed questions of fact underlying voluntariness *vel non* and make a specific finding that the confession was or was not voluntary . . . ." *Green* v. *United States,* 122 U.S. App. D.C. 33, 36, 351 F.2d 198, 201 (1965). It has generally been recognized that the determination of the credibility of witnesses is for the trier of fact. See *e.g., (William M.) Rouse* v. *United States,* 123 U.S. App. D.C. 348, 351, 359 F.2d 1014, 1017 (1966) (concurring opinion of McGowan, J.); *Smith (and Cunningham)* v. *United States,* 122 U.S. App. D.C. 300, 353 F.2d 838 (1965), *cert. denied,* 384 U.S. 910 (1966). Findings of basic, primary or historical fact which are the purpose of an evidentiary hearing such as the instant one under review are the particular responsibility of the trial judge. *Cf. Townsend* v. *Sain, supra* at 309-16. Where the facts are in conflict, the finding of fact by the trier should be accepted. See *United States ex rel. Russo* v. *New Jersey,* 351 F.2d 429, 433 (3d Cir. 1965), *vacated,*

384 U.S. 889, *cert. denied,* 384 U.S. 1012 (1966). If there is a conflict in the evidence on the question of voluntariness, "great reliance" must be placed upon the finders of fact. *Blackburn* v. *Alabama,* 361 U.S. 199, 208 (1960). Where the conflicting contentions have not been resolved, the case will be remanded to the trial court for such resolution. See *Jackson* v. *Denno, supra; United States* v. *Adams,* 73 U.S. 101 (1867).

The Supreme Court in reviewing the question of voluntariness in analogous situations makes an independent determination, but only on the undisputed facts, because that Court has recognized that "[w]here pure factual considerations are an important ingredient, which is true in the usual case, appellate review in [the Supreme] Court is, as a practical matter, an inadequate substitute for a full and reliable determination of the voluntariness issue in the trial court and the trial court's determination takes on an increasing finality." See *Jackson* v. *Denno, supra* at 390-91; *Thomas* v. *Arizona,* 356 U.S. 390, 402-03 (1958); *Davis* v. *North Carolina,* 384 U.S. 737 (1966); *Townsend* v. *Sain, supra.*

The hearing judge determined on the record before him that beyond a reasonable doubt appellant's statement was voluntary. The standard he applied, though unsettled in this jurisdiction at the time of his decision, was a higher standard than the one which is now controlling, that the confession "should not be admitted in evidence unless the trial judge makes a preliminary determination and an express finding that on all the evidence he is satisfied that the confession was voluntary when made." *Clifton* v. *United States,* No. 19,757, D.C. Cir., November 15, 1966.

Those findings should not be overturned unless this Court finds them to be "clearly erroneous." *United States* v. *Page,* 302 F.2d 81 (9th Cir. 1962); *Reyes* v. *Neelly,* 264 F.2d 673 (5th Cir. 1959). *Cf. (Henry W.) Jackson* v. *United States,* 122 U.S. App. D.C. 324, 353 F.2d 862 (1965). Ample competent evidence adduced at the hearing, appellee submits, supports those findings.

III. The totality of the circumstances shown at the evidentiary hearing on mandate shows clearly that appellant's statement to the police at the hospital shortly atfer the crime was voluntary.

(Tr. 16-25, 27-39, 31-33, 43, 52-59, 64-67)

Whether an accused person's confession was obtained by coercion *vel non* must be answered by reviewing all the circumstances surrounding the confession. *Bram* v. *United States,* 168 U.S. 532 (1897). To have found properly that appellant's statement to Detective Coppage of the Homicide Squad was voluntary, the hearing judge had to find, in substance, that appellant's will was not in fact overborne, regardless of the purpose of the interrogator or his knowledge of that fact, see *Townsend* v. *Sain, supra;* that his statement was the expression of free choice by one who at the time of the confession was in the possession of mental freedom to confess or deny his suspected participation in crime, see *Lisenba* v. *California,* 314 U.S. 219 (1941); and that he had the competence to choose to speak in the free and unfettered exercise of his own will, see *Malloy* v. *Hogan,* 378 U.S. 1 (1964). The evidence before the hearing judge shows that appellant's statement met those standards and thus was voluntary.

On the instant record, if the circumstances of pressure were weighed against appellant's power of resistance, see *Thomas* v. *Arizona, supra; Fikes* v. *Alabama,* 352 U.S. 191, 197 (1957), it is apparent from the preceding discussion relating to the *Mallory* Rule that an opportunity to apply illicit pressure was never presented. There was no "unnecessary delay," which might suggest a police purpose to question secretly in order to extract a confession. Appellant's presence in the emergency room of the Sibley Hospital under close medical supervision at a time when the fact that he had a bullet wound in his head would predictably have made him subject to constant and close scrutiny would have created most unfavorable circumstances for police exploitation of his condition (Tr. 16-20).

The other facts of record give added support to this conclusion. The detective's conduct showed no use of pressure. He was ignorant of the circumstances of the crime, a fact which lends support to his disclaimer of using leading questions (Tr. 21). He deferred to the attending doctor from whom he first got permission to speak to appellant and later got permission to transfer appellant to D. C. General Hospital where he could be guarded (Tr. 18, 23, 31-33). His interview was short, lasting "Not over five minutes", his tone of voice was normal and manner of inquiry restrained, and he did not conduct the interview with awareness of any signs that appellant was in pain or was having difficulty breathing (Tr. 21-23, 27). Appellant was coherent and displayed no unwillingness to continue speaking to the detective (Tr. 22). And though he was within two feet of appellant's face, the detective perceived no odor of alcohol (Tr. 19, 28-29). In sum, the record shows that no improper pressure whatever was used which might have rendered the statement involuntary.

Under such conditions, even if the inference appellee suggests is drawn, that the detective did not adequately warn appellant of his constitutional rights before appellant's statement was made, the voluntary tenor of the statement would not be changed. That circumstance, albeit significant, is but one of the totality of circumstances within which the voluntariness of his statement must be considered. See *Johnson* v. *New Jersey, supra* at 729; *Davis* v. *North Carolina* at 741-42. Besides, the fact that appellant shot himself suggests that a sense of personal guilt may well have caused him to make his incriminating statement to a ready listener. *Cf. United States ex rel. Russo* v. *New Jersey, supra* (confession attributed to loss of hope of concealing guilt rather than to reprehensible police questioning). Compare, *Hall* v. *Warden, Maryland Penitentiary,* 313 F.2d 483 (4th Cir. 1963) (possibility that unlawful search applied psychological pressure to confess was fatal to conviction).

In addition, the pertinent record supports the trial judge's conclusions that the uncontradicted testimony describing appellant's condition while he was at Sibley Hospital showed that he was competent and that his statement was voluntary. Appellant showed no sign of such distraction by pain or weakness from the effects of his wound, intoxication, or difficulty in breathing, that he was not free to confess or deny his guilt (Tr. 21-24). The record discloses no administration of drugs (Tr. 23). He was coherent; the story he told made sense to the inquiring officer, he spoke out, and had no apparent trouble talking (Tr. 22). The Sibley Hospital record stipulated into evidence described him as "conscious and ambulatory [and] coherent." (Tr. 43, 64-66). And a similar record apparently prepared in part by Dr. Mena at D. C. General Hospital indicated that appellant was "coherent" and could "talk coherently", though it also recorded that an "alcohol odor" was perceptible about him (Tr. 66-67).[16] Detective Coppage described appellant as sufficiently strong to be able to move around and to raise himself from the examining table and swing his legs down before he was assisted by the doctor and attendants onto the stretcher by which he was transferred to D.C. General

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[16] What was apparently a subsequent entry on the record, however, indicated, "On admission patient is conscious, has strong odor of alcohol on his breath, and is very confused. Unable to obtain any history from patient except that since he inflicted the head wound he has been unable to see." (Tr. 67). Detective Coppage observed what was apparently this change during the short time he was at D.C. General Hospital (Tr. 27). And Dr. Mena's deposition testimony that apellant was 'lethargic', and that he could talk but not fluently and just answered questions yes or no also reflected the changes (Tr. 54). The obvious inference, of course, is that appellant's condition changed, so that the observations at D.C. General Hospital do not reliably reflect his condition at the time of his statement made at Sibley Hospital. This was the conclusion the hearing judge reached. The substantial time lapse of roughly a half to three-quarters of an hour between the statement to Detective Coppage and appellant's re-examination at D.C. General and the total lapse of two hours or more from the time of the statement and the time Dr. Mena recalled examining appellant could provide a reasonable opportunity for such a change (Tr. 16, 21-25, 27, 54, 58, 67).

Hospital (Tr. 24, 27). Dr. Mena testified that the bullet in appellant's head had not damaged his brain (Tr. 58-59).[17] And appellant was not suffering from shock, for his blood pressure and pulse were normal when he got to D.C. General Hospital (Tr. 55).[18]

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[17] Dr. Carlos Mena Diaz was the chief resident in neurosurgery at D.C. General Hospital when at one or two in the morning of June 29, 1960 he was called by the intern who conducted appellant's preliminary examination after his transfer to that hospital. (Tr. 52-53, 58). His testimony was contained in a deposition taken for the hearing and introduced in part into evidence. Dr. Diaz's examination had revealed that appellant was intoxicated, "At the moment I could not say what kind of intoxication; but he looked a little lethargic, like something was—he was not really normal." (Tr. 53-54). Appellant's blood pressure, pulse, and respiration were normal, he was not in shock; he was conscious, and he could talk, but not fluently ("he just answered questions yes or no") (Tr. 54-55). Because of the course of the bullet there was no damage to appellant's brain (Tr. 58-59). The doctor described the pistol wound and the significant absence of watery blood, though both eyes were very swollen, showed signs of a big hemorrhage, and revealed an abnormal accumulation of fluid (Tr. 54). His right eye was blinded but he could perceive light with his left eye (Tr. 54-55). The x-ray showed that the bullet had entered the right temple and lodged in the middle of the skull after destroying the right optic nerve and shattering small pieces of the bone and bullet over the frontal sinuses (Tr. 55, 59). There was no contusion, but there "had to be" a concussion of the brain "so that the person at that moment, and even the next day, cannot be . . . in a normal condition. That means that we call this syndrome a concussion, that is, little confused and lethargic. He can have some headaches . . . [h]e can have amnesia . . . ." (Tr. 55-56). The doctor opined somewhat ambiguously that regarding appellant's probable response to questions, that at "that particular time", putting "altogether the state of intoxication" . . . then the concussion . . . [it could be concluded that he was in a state in which] . . . he doesn't care anything . . . He can answer yes or no to any question that somebody asks. . . [and with respect to whether appellant "would or would not be able to affirmatively protect himself as far as any questions were concerned] , . . "he can say, answer yes or no; so, or he was indifferent to protect himself or not to protect him." (Tr. 56-57). The doctor did not, however, as the hearing judge noted in his opinion, state that appellant actually suffered from such symptoms and this testimony thus hardly seems conclusive on the issue of actual voluntariness.

[18] The Sibley Hospital record showed "BP = 130/80 P = 60"; the D.C. General Hospital record showed "B/P = 120/80 P = 65".

No matter how serious the apparent nature of appellant's wound, like the possible effect of drugs, see *Jackson* v. *Denno, supra; Townsend* v. *Sain, supra; Morales* v. *United States,* 344 F.2d 846 (9th Cir. 1965), the question of voluntariness could only be resolved by a factual determination of its actual effect. See *United States ex rel. Russo* v. *New Jersey, supra* (all circumstances weighed despite Russo's serious condition); *Jackson* v. *Denno, supra* at 392 (opinion of the Court) (evidence of serious bullet wounds and administration of drugs nevertheless required factual determination of the effect on voluntariness); but see, *Ibid.*, 408-09 (dissenting opinion of Mr. Justice Black) (Justice would have found second confession obtained after administration of drugs involuntary on undisputed facts). Likewise, the mere fact that appellant might have been somewhat under the influence of alcohol when he made his statement still raises a factual question which may be resolved by the showing made on this record that appellant's narrative was clear, definite, rational, and responsive. *Doyon* v. *Robbins,* 322 F.2d 486, 495 (1st Cir. 1963), *cert. denied,* 376 U.S. 923 (1964). Compare, *e.g., Logner* v. *North Carolina,* 35 U.S.L. Week 3219 (M.D.N.C. Nov. 29, 1966). In this jurisdiction, in fact, the pertinent decisions state a strict rule, that the effects of alcohol must reach the point of mania in order to render the confession involuntary from that cause. *Mergner* v. *United States,* 79 U.S. App. D.C. 373, 147 F.2d 572, *cert. denied,* 325 U.S. 850 (1945); *Morton* v. *United States,* 79 U.S. App. D.C. 329, 147 F.2d 28, *cert. denied,* 324 U.S. 875 (1945). There was certainly no such showing relating to the time of the statement in this record. Thus the hearing Judge's conclusion that the statement was voluntary is amply supported by the record and was patently not "clearly erroneous."

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,433

EMANUEL PEA, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From an Order of the United States
District Court for the District of Columbia

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April 12, 1967

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,433

EMANUEL PEA, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

On Appeal From an Order of the United States District Court
for the District of Columbia

I.

In Appellant's main brief, the primary reason advanced for reversal of the decision below was that the District Court's finding that substantively the oral confession was given voluntarily by Appellant was erroneous. As an additional reason for reversal, Appellant contended that even though the delay in taking him to a committing magistrate was excusable because of the drastic medical situation, the failure of the police to advise him of his rights before questioning him at a time when he was in police custody, violated the spirit of Rule 5 of the Federal Rules of Criminal Procedure and, therefore, it was plain error to have allowed the inculpatory statement to be received in evidence.

The Government incorrectly characterizes Appellant's Rule 5 argument as alleging a violation of the Mallory Rule. The Mallory Rule, of course, pertains to "unnecessary delay" in bringing an accused person before a committing magistrate, as required by Rule 5(a) of the Rules. Appellant does not assert that there was any such unnecessary delay. Appellant does contend that under the prevailing circumstances, the least that the police should have done before undertaking a confession-eliciting interrogation of the accused was to advise him of his constitutional rights, as a committing magistrate would have done pursuant to Rule 5(b) if there had been no delay. In the absence of such advice, police testimony of Appellant's incriminating statements should not have been relied upon to convict Appellant. Thus, much of the Government's argument on the Rule 5 point is misdirected.

Even though Mallory is not strictly applicable, the policy considerations underlying Mallory are very pertinent. If the confession had in fact been voluntarily given at the "threshold" of contact with the police, it would have been deemed "spontaneous" within the Mallory definitions and not even unnecessary delay subsequently would have vitiated that confession. But Appellant's alleged confession was not given at the threshold of his encounter with the police. Shortly after the shootings, Appellant was "grabbed" and, in response to a police officer's question, disclosed that there was a gun at his feet. 1/ Appellant was taken physically to a police wagon by two other police officers. He was under police supervision on the way to and in the hospital

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1/ The arresting officer testified at the Coroner's Inquest (Coroner's Tr. 4): "I ran east in the unit block of Eye Street, and a man pointed to a colored man leaning against a car and said, that's the man. I ran up to this person and grabbed him by the arm and asked him Where's the gun. He stared at my feet. * * *" See also T.Tr. 67.

emergency room. The police detective who thereafter obtained the confession had already been informed by the arresting officer of the police version of the basic facts in the case, and therefore the detective knew that Appellant would remain in police custody even if he professed his innocence. 2/ After obtaining Appellant's name and address, there was no need for further police questioning prior to arraignment before a magistrate. "Interviews by Government agents with accused persons in the absence of counsel may be employed to develop investigative leads as to others, but not to produce evidence for the trial of the accused." Greenwell v. United States, 119 U.S.App.D.C. 43, 47, 336 F.2d 962, 966 (1964). That the police detective who questioned Appellant was not seeking investigative leads to others, and that the police process had become accusatorial in nature, are further indicated by the detective's own testimony at the confession hearing (Tr. 19):

> "Then I asked him, as I remember, his name; where he lived. I further told him that it had been stated to me that he had shot his wife, down in the unit block of I Street."

In Commonwealth v. Jefferson,____Pa.____, 226 A.2d 765 (1967), the Supreme Court of Pennsylvania decided a closely analogous case on post-Escobedo constitutional grounds. The Pennslyvania court ruled that when one police officer had learned enough from the defendant so that she "was certainly not free to leave" a hospital emergency ward, a subsequent admission - without prior advice of rights - to a second police officer at the hospital was not a spontaneous statement made in the course of a general investigation, and was therefore

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2/ The interrogating detective stated at the confession hearing (Tr. 15): "He [the arresting officer] informed me that there had been a shooting, and that the suspect had been taken to Sibley Hospital. And he was holding in his hand a small gun which he stated belonged to the suspect and that had been used in the shooting."

inadmissible as evidence. The court held that the second police officer's inquiry (even though directed to several persons together) was no longer "general questioning," but was "custodial interrogation" which is part of the adversarial or accusatorial stage of the criminal process. "Custodial interrogation is not limited to police questioning or that occurring after a formal arrest." 226 A.2d at 767, 768.

The same result is sought in the instant appeal on the basis of Rule 5 of the Federal Rules of Criminal Procedure and the Court's supervisory power over lower courts of this jurisdiction. See Brief for Appellant, Argument II.

Appellee's statement (Brief, p. 13 n.10) that "appellant was insulated from secret interrogation and pressure by his removal from police control to the custody of the hospital" is specious. The interrogation of Appellant by the detective was not overheard by any other person (T.Tr. 126), and the Government produced no witnesses to support the detective's other statements concerning the questioning. See Appellant's Brief, p. 27.

Appellee's Brief (p. 13 n.12) also quotes from Judge McGowan's concurring opinion in Alston v. United States, 121 U.S.App.D.C. 66, 68, 348 F.2d 72, 74 (1965), taking note of an argument that police questioning permits an accused to make an early claim of self-defense. It fails, however, to quote Judge McGowan's conclusion, which followed immediately:

> "These considerations have merit, but they presume a purpose on the part of the interrogator not limited to the elicitation only of a damaging admission, and they suggest also that the prisoner should, before he decides to respond, have at least the basic information as to his right to remain silent and the use to which his answers may be put." (Emphasis added.)

Appellee contends that the Rule 5(b) point may not be considered at this time. But the serious concern about this issue which the Court expressed in its previous review of Appellant's conviction has not been dispelled. The

Court said that it could not consider reversal of Appellant's conviction on the Rule 5(b) ground at that time because neither prosecution nor defense had "sought to ventilate the issue" (116 U.S.App.D.C. 410-11, 324 F.2d 442-43). At the confession hearing, both the prosecutor and the defense attorney adverted to the issue (Tr. 76, 110-12). As stated in Appellee's Brief (p.9,n.4):

> "The government's position at the hearing was, and on this appeal continues to be, that a possible violation of Rule 5, Fed. R. Crim. P. was not an issue to be resolved at the hearing. (Tr. 110). The prosecutor also correctly observed that the issue had not been pursued at trial or on the subsequent appeal (Tr. 111)."

The hearing judge did not give any consideration in his opinion to the Rule 5 question.

The Government's insistence that this Court is foreclosed from considering the point may be due to its unwillingness to recognize that recent decisions of the Supreme Court make it clear that the burden rests on the Government to show affirmatively that Appellant was advised of his rights. Hence, the Government can no longer derive support from a silent record. (Appellant's Brief, pp. 28-29, 18-20.)

The Government's argument (Brief, pp. 8-9 and n.4) is basically that, because the Supreme Court remanded the case for one purpose - a hearing on the voluntariness of the confession - this Court cannot reconsider any other point in the case. The authorities cited for the proposition that on remand for one purpose the court should not reconsider any other prior ruling are not controlling. They should not be deemed dispositive in a situation such as the instant one, where justice - in the light of recent judicial pronouncements - demands reconsideration, and where the issues are so closely related, involving as they do, a common factual determination. As previously noted (Appellant's Brief, p. 29), the Supreme Court, in remanding for further hearing, expressly vacated the judgment of this Court. Thus the case is still here on direct appeal.

II.

The Government contends that the Court is restricted to reviewing the transcript of the confession hearing and the subsequent opinion of the Court. Also, it argues that the hearing judge's ultimate conclusion should not be overturned unless "clearly erroneous." These propositions are inconsistent with Supreme Court decisions in involuntary confession cases in which the Court has repeatedly made independent determinations of voluntariness, using all of the evidence at its disposal.

> "It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an independent determination here, see, e.g., Ashcraft v. Tennessee, 322 U.S. 143, 147-148 . . .; 'we cannot escape the responsibility of making our own examination of the record,' Spano v. New York, 360 U.S. 315,316 . . . ." Haynes v. Washington, 373 U.S. 503, 515 (1963)(emphasis in original).

In Davis v. North Carolina, 384 U.S. 737, 741-42 (1966), a majority of the Court reiterated its duty "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." (Emphasis added.)

This Court certainly has no less responsibility to undertake a complete and independent review of the facts bearing upon such an important constitutional question. When the involuntariness of a confession admitted into evidence is demonstrated at any stage of the proceeding, the courts must reverse any resulting conviction, because the conviction is void for want of an essential element of due process. See Blackburn v. Alabama, 361 U.S. 199, 210-11 (1960).

It is not necessary for this Court to resolve any disputed questions of basic fact to reach a conclusion upon the ultimate fact of voluntariness.

"Such disputes, we may say, are an inescapable consequence of secret inquisitional practices. And always evidence concerning the inner details of secret inquisitions is weighted against an accused . . . ." Ashcraft v. Tennessee, 322 U.S. 143, 152 (1944). Moreover, many of the hearing court's intermediate findings (such as whether or not Appellant was intoxicated when he gave his confession) are based on undisputed subsidiary facts which this Court may evaluate for itself. 3/

An application of even a "clearly erroneous" standard to the lower court's findings would require the Court to decide that Appellant was intoxicated by alcohol at the time of the alleged confession. See Brief for Appellant, pp. 14-15. Moreover, it was clearly erroneous for the hearing court not to consider as a "significant factor" in determining voluntariness the fact that Appellant was not advised of his constitutional rights before his interrogation. See Brief for Appellant, pp. 18-20. Further, it was clearly erroneous for the hearing judge not to make a finding concerning the credibility of Appellant's testimony concerning his amnesia and, if not discounted, to weigh the significance of such testimony in the determination of Appellant's mental freedom. See Brief for Appellant, pp. 17-18. Finally, it was clearly erroneous for the lower court to refuse to consider Appellant's Rule 5 argument, in light of this Court's previously expressed interest in the matter. See discussion above and Brief for Appellant, p. 28.

3/ In the latter part of footnote 17 in the Government's Brief (p.22), certain expert medical testimony as to intoxication, lethargy and "inability to protect himself" which the hearing judge recited as referring specifically to Appellant is confused with other testimony (with respect to headaches and amnesia) which Dr. Mena testified to as general symptoms which accompanied the kind of injury which Appellant had suffered. It was only to the latter symptoms that the court below referred in pointing out that "[Dr. Mena's] testimony did not state that the defendant had actually suffered from either." See Opinion, pp. 7-8; Brief for Appellant, pp. 14-15, 17.

Respectfully submitted,

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April 12, 1967

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMANUEL PEA, JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 20,433
	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

On Hearing En Banc In Appeal From the United States District Court For the District of Columbia

MEMORANDUM FOR APPELLANT

PRELIMINARY STATEMENT

After Appellant's conviction of murder was affirmed (116 U.S.App. D.C. 410, 324 F.2d 442 (1963), the Supreme Court summarily vacated the judgment of this Court and remanded the case in accordance with Jackson v. Denno, 378 U.S. 368 (1964), 1/ for a hearing on the question of the voluntariness of the confession which had been introduced at Appellant's trial (378 U.S. 571). A hearing was held and the District Court found beyond a reasonable doubt that the confession was voluntary. On December 20, 1967, this Court held that the order of the District Court must be

1/ The Supreme Court held in Jackson v. Denno that a defendant is entitled to an independent hearing that is "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession" - a "full and reliable determination" - one that "fully resolves the issue of voluntariness." 378 U.S. at 391 & n.19.

reversed. The Court stated that clearly on the record before it "it cannot fairly be found beyond a reasonable doubt that the confession was voluntary" (slip opinion, p. 17). Therefore, the Court held if the reasonable doubt standard which had been used by the District Court judge is the appropriate one for a determination of voluntariness by him, "a new trial must be held without introducing the confession in evidence" (ibid).

In view, however, of the disagreement among the panel in Clifton v. United States, 125 U.S.App.D.C. 257, 371 F.2d 354 (1966), cert. denied, 386 U.S. 995 (1967), with respect to whether or not a reasonable doubt standard is necessary in a determination by the trial judge of the voluntariness of a confession in a hearing pursuant to Jackson v. Denno, a majority of the active judges of this Court directed on December 20, 1967 that a hearing en banc should be held on this issue. In the opinion issued the same day, counsel were requested to address themselves to that issue "and to the relief sought in the light of their contentions taken in conjunction with this opinion" (slip opinion, p. 19).

Although the extent of the prosecution's burden of proof was discussed at length in the opinions of Judge Burger and Judge Leventhal in Clifton, and the parties were not directed to file additional briefs, this Memorandum has been submitted to augment the analysis of that issue and also to indicate the relief which Appellant believes appropriate.

QUESTIONS PRESENTED

1. Whether, as a constitutional imperative under Jackson v. Denno or pursuant to a sound exercise of this Court's supervisory power, a trial judge should not admit a confession unless he is convinced beyond a reasonable doubt that it is voluntary; or whether it is sufficient that he be satisfied of its voluntariness by some lower standard of admissibility if the jury is subsequently instructed to disregard the confession unless they find it voluntary beyond a reasonable doubt.

2. Whether, under either of the answers to question 1, a new trial would be the only appropriate relief.

ARGUMENT

I. A TRIAL JUDGE MAY NOT ADMIT A CONFESSION FOR ANY CONSIDERATION BY THE JURY UNLESS HE IS CONVINCED BEYOND A REASONABLE DOUBT THAT IT WAS VOLUNTARILY MADE

There is only a narrow, albeit crucial, difference between the two views expressed in Clifton v. United States, supra, on the standard of persuasion issue. Judge Burger's and Judge Leventhal's opinions are fully in agreement on the proposition that the defendant is entitled at some point during the trial stage to have his confession found voluntary beyond a reasonable doubt. They are also apparently in full agreement on the proposition that if the question of voluntariness were not submitted to the jury - that is, if this jurisdiction followed the "Orthodox" rule in which only the trial judge passes on the voluntariness

of the confession and if he finds it voluntary admits it for the jury's consideration of credibility and probative value only - a reasonable doubt standard for the trial judge would be required. The difference between the two positions turns on whether the re-submission of the issues to the jury which must use the reasonable doubt standard permits a lower standard to govern the trial judge's determination on the point. Appellant submits that, contrary to the essential thrust of Judge Burger's opinion, the subsequent step of submitting the question of voluntariness to the jury - the so-called "Massachusetts" procedure - adds nothing of dependable substance to the "orthodox" procedure and, therefore, it is not an adequate substitute for a reasonable doubt determination by the trial judge.

The complexity of the factors which enter into a determination of voluntariness, involving as they do not only disputed historical or physical facts but also considerations of the constitutional significance of these facts, has been recognized repeatedly by this Court. See, e.g., Fuller v. United States, No. 19,532, decided November 20, 1967; Pea v. United States, No. 20,433, decided December 20, 1967. Even if a jury of laymen were capable of coping with such complex factors, it is extremely doubtful, at best, that its appraisal of these factors could be completely divorced, as they must be, Rogers v. Richmond, 365 U.S. 534 (1961), from the reliability or truth of the confession. Indeed, the Supreme Court observed in Jackson v. Denno, supra, at 386, that "the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the

confession into the assessment of voluntariness." See also, Hutcherson v. United States, 122 U.S.App.D.C. 51, 55, 351 F.2d 748, 752 (1965). If impermissible considerations inevitably enter into the determination by the jury, it would seem inescapable that a reliable determination of voluntariness cannot be derived from the jury's general verdict of guilty. Since no disagreement has been expressed by any member of this Court with the proposition that a reasonable doubt standard for the trial judge is required in order to assure a "reliable and clear-cut determination" of voluntariness under a procedure (the orthodox rule) in which the jury does not pass upon this point, it follows, we submit, in view of the obvious frailty of the jury's general verdict as a buttress of the preliminary determination, that the same high standard of proof must govern the trial judge even if under the Massachusetts rule he subsequently submits the question to the jury.

It takes great faith to expect a casual group of laymen - who have only their memories to rely upon when deliberating in the jury room days or weeks after the voluntariness issue has been raised - to separate evidence of voluntariness from the evidence (and arguments) of guilt and of reliability of the confession and to reach a determination of voluntariness prior to their consideration of its merits. Perhaps a mind trained to sift evidence might substantially accomplish such a difficult task (the chances are, of course, better if the determination is made while the evidence is fresh, early in the proceeding rather than near its end) but to expect unskilled minds of jurors to do so as part of their total consideration of the case is

unrealistic. See Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L.Rev. 165, 168 (1929). Indeed, in the absence of a special verdict with an explicit finding of voluntariness, we cannot know that the issue was resolved at all by the jury. Manifestly, the Supreme Court in Jackson was unwilling to rely on the jury for a "reliable and clear-cut" determination of voluntariness.

Concededly, the Supreme Court did not expressly state which standard of proof should be used by the judge. It is submitted, however, that it is reasonably clear that a much higher standard is contemplated by the Supreme Court than is afforded by "conventional admissibility criteria" (the phrase used by the majority in Clifton, 125 U.S.App.D.C. at 262, 371 F.2d at 359). Miranda v. Arizona, 384 U.S. 346 (1966), imposed a "heavy burden" on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel. This was not unique for "This Court has always set high standards of proof for the waiver of constitutional rights." (Emphasis added.) It has been aptly stated that "the trend of the Supreme Court's recent opinions may lead to the belief that Jackson v. Denno and Miranda will be supplemented in due course with the reasonable doubt standard and the safer course would be for our trial judges to use that standard in all future hearings on voluntariness and admissibility." State v. Yough,49 N.J. 587, 231 A.2d 598 (1967).

Whether or not the jury passes on the issue of voluntariness is not a matter of constitutional dimensions but rather a matter of grace. 2/ As Judge Leventhal pointed out in Clifton: "Jackson makes clear that the Supreme Court's approval of the Massachusetts rule rests on the premise that it provides as much protection as the orthodox rule in regard to the screening by the judge, which remains the basic determination safeguarding the accused even though voluntariness is re-submitted to the jury." 125 U.S.App.D.C. at 265, 371 F.2d at 362. The Massachusetts procedure has been criticized as possibly resulting in "passing the buck" whereby an indolent or timid occupant of the bench may be inclined to sidestep work or responsibility or both by admitting questionable evidence. People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179 (dissent of Judge Van Voorhis); State v. Whitener, 191 N.C. 659, 132 S.E. 603 (1926). From the standpoint of the defendant, even though the charge to the jury under the Massachusetts rule calls upon them to determine voluntariness, it is not unlikely that, in actuality, it amounts to nothing more than the submission of credibility of the confession.

Although the Massachusetts procedure has not been questioned by the Supreme Court, "[g]iven the integrity of the preliminary proceedings

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2/ Justice Black interpreted the majority opinion in Jackson v. Denno to mean that a jury determination of voluntariness would henceforth be a "mere matter of grace," and he stated that if a "beyond a reasonable doubt" test were not applied by the judge, the new procedure would be "a distinct disadvantage to the defendant." 378 U.S. at 404, 405 (dissenting opinion).

before the judge . . .[and providing] the confession is properly found to be voluntary by the judge" (Jackson v. Denno, supra, at 378 n.8), the resolution of the question whether voluntariness must be established to the satisfaction of the judge beyond a reasonable doubt in order to be submitted to the jury should be the same under both the orthodox and the Massachusetts rules. For, as Judge Leventhal pointed out in Clifton, "Any redetermination by the jury may be 'ultimate' in time but not in constitutional significance." 125 U.S.App.D.C. at 266, 371 F.2d at 363.

The submission of the issue to the jury involves not only difficulties on their part of distinguishing between voluntariness and truth but, paradoxically, aggravation of those difficulties by the fact that the evidence on voluntariness which is presented to the jury may be less than was available to the judge. As Judge Leventhal noted, "There may be more evidence before the court than before the jury, for example the testimony of the defendant who dare not risk presentation of prior convictions to the jury" (ibid.). 3/ If the trial judge should hold a confession voluntary despite a reasonable doubt, the defendant may be required to forego his constitutional right not to testify before the jury in order to assure a full presentation

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3/ It is established in this jurisdiction that the defendant may challenge voluntariness outside the jury without waiving his privilege against self-incrimination. Bailey v. United States, No. 20,623, decided December 14, 1967, citing Wright v. United States, 102 U.S.App.D.C. 36, 45, 250 F.2d 4, 13 (1937). However, a defendant cannot testify before the jury on voluntariness without exposing himself to cross-examination which may go beyond what has been said by him on direct to include, for example, evidence which impeaches his credibility, such as a criminal record. See Witt v. United States, 196 F.2d 285 (9th Cir. 1952); Raffell v. United States, 271 U.S. 494, 497 (1926).

to them of the facts on the voluntariness point. Not only is it unfair to require the defendant to give up his constitutional right against self-incrimination by taking the stand before the jury but, realistically, the damage of submitting a confession to a jury which they later find involuntary cannot be repaired by an instruction to disregard it.

The view that "conventional admissibility criteria," which, presumably, connotes a "preponderance of evidence" or similar standard, applies to the judge's determination under the Massachusetts rule disregards the Fifth Amendment underpinning of the law concerning the use of confessions. If the Supreme Court in Jackson v. Denno had not regarded the issue of voluntariness as a fundamental federal constitutional question rather than a procedural question of admissibility of evidence, it is unlikely that it would have disrupted local procedural patterns throughout the country. The use of voluntary confessions is constitutionally obnoxious. They are excluded from evidence because of a "complex of values," including not only the likelihood that the confession is untrue but also "the preservation of the individual's freedom of will" and the "abhorrence of society to the use of involuntary confessions." Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

Judge Burger asserted in Clifton that if a reasonable doubt standard governed the admissibility of a confession by a trial judge in a Massachusetts rule jurisdiction, it "alone among all the myriad of evidentiary material [would] be singled out for a unique standard

of appraisal," 125 U.S.App.D.C. at 261, 371 F.2d at 358. A special status for confessions as compared with other evidentiary material is, we submit, justified by the higher constitutional footing of confessions as well as the devastating effect which they have, as compared with other evidence, upon the ultimate determination of guilt or innocence. Some of the authorities which have recognized the distinctive nature of the voluntariness determination, which not only has deep constitutional roots but is almost universally regarded as having overpowering weight with the jury, are set forth in the Clifton opinion of Judge Leventhal (125 U.S.App.D.C. at 265 n.3, 371 F.2d 362 n.3). And, as he stated, "The very introduction of an involuntary confession is a denial of constitutional rights so prejudicial as to vitiate the conviction irrespective of the quantum of other untainted evidence demonstrating the guilt of the accused." Ibid. In State v. Keiser, 274 Minn. 265, 143 N.W.2d 75, the Minnesota Supreme Court stated:

> "It should be conceded that in many instances the impact of a voluntary confession admitted in evidence is so devastating as to almost assure a verdict of guilty. Under such circumstances, the trial court takes an important part in making a fact determination. That being the case, it would seem to us that the evidence of voluntariness should be of such persuasive force as to satisfy the court to a moral certainty or beyond a reasonable doubt that a confession was voluntarily given." (Emphasis added.)

Although Keiser was decided under the orthodox rule, the quotation above is no less cogent under the Massachusetts procedure, because, as we previously stressed, the resubmission of the question to the jury is an illusory safeguard. If the confession is admitted for the jury's

consideration, its effect upon the jury will usually be so overwhelming that a "reasonable doubt standard" for its determination of voluntariness will inevitably be influenced by the jury's views of credibility and probative value of the confession. And if the jury believes the confession, a guilty verdict will practically be assured. In short, judicial error at the preliminary stage will seriously impair the fairness of the whole trial. Thus, consistent application of policies that require proof beyond a reasonable doubt on the merits dictate proof beyond a reasonable doubt on the admissibility of a confession before the jury is allowed to consider it for any purpose.

It should be noted that the premise of the majority in Clifton that reasonable doubt would be a "special and unique" admissibility standard (125 U.S.App.D.C. at 261, 371 F.2d at 358) is itself questionable. For example, in State v. Yough, supra, 231 A.2d at 603, the Supreme Court of New Jersey stated that "cases dealing with devastating evidence such as proof of other crimes, dying declarations and confessions, have presented conflicting views" on whether the reasonable doubt standard is applicable. And it has been stated, 96 A.L.R. 621, 622 (1935), that "By the weight of authority . . . it is held that the preliminary matters necessary to the admission in evidence of dying declarations must be proved beyond a reasonable doubt, the courts requiring the same degree of proof of these facts as is required with respect to proof of the elements of the crime itself." Furthermore, it would be inconsistent to regard the admissibility of a confession as governed by "conventional admissibility

criteria" while coupling its admissibility with a requirement that a jury must reconsider the point and disregard the confession unless they find it voluntary beyond a reasonable doubt.

The suggestion in Judge Burger's opinion that if the judge has to decide beyond a reasonable doubt he would be placed in the temporary role of "juror" thereby denigrating the historic fact-finding role of jurors is also questionable. To the extent that the reasoning is sound, the charge of denigrating the jury's role should be laid at the door of the Supreme Court for holding in Jackson v. Denno that it is not constitutionally adequate for the judge to allow juries to pass upon the voluntariness of confessions when there is no more than sufficient credible evidence upon which they may base their decision. But no denigration of the jury's role occurs since the accepted theory of jury trial requires that only legal evidence on the matters in dispute be submitted to the jury. There never was a time when every question of fact arising even in a civil lawsuit was to be decided by the jury. There is no more a usurping of the role of the jury in the judge's screening out a confession as illegal than there is with respect to any other evidence which the judge, after hearing evidence of disputed facts, rules to be beyond the province of the jury to pass upon.

As Judge Burger noted in Clifton, many courts which follow the orthodox procedure have held that in this country the reasonable doubt standard governs the determination by the trial judge (125 U.S. App.D.C. at 260 n.7, 371 F.2d at 357 n.7). Judge Leventhal stated that so far as he was aware every court that had analyzed Jackson v.

Denno in its opinion (whether it followed the orthodox or the Massachusetts procedure) had reached the same result as the Fourth Circuit did in United States v. Inman, 352 F.2d 954, 956 (1965), which required a reasonable doubt test for the trial judge's determination even though the issue is to be resubmitted to the jury (125 U.S.App.D.C. at 266 & nn. 7-10, 371 F.2d at 363 & nn. 7-10). The Fourth Circuit recently reiterated its position in Mullins v. United States, 382 F.2d 258 (1967). The review of the post-Jackson rulings in state and federal courts which has been made by counsel for Appellant has not revealed a wholly consistent pattern of holdings on this precise issue. For example, in Moser v. United States, 381 F.2d 363,364 (1967), the Ninth Circuit, without any reference whatever to Jackson, merely stated that "The trial judge before ruling the confessions admissible held a lengthy preliminary hearing to determine whether there was evidence from which the jury might determine beyond a reasonable doubt that the confessions were freely and voluntarily given." In People v. Huntley, 15 N.Y.2d 72, 255 NYS 838, 204 N.E.2d 179 (1965), the Court of Appeals of New York (which had been reversed in Jackson v. Denno) required the reasonable doubt standard even though the question of voluntariness is resubmitted to the jury. Although United States v. Feinberg, 383 F.2d 60, 69-70 (2nd Cir. 1967) is not entirely clear on the point, it appears to endorse that view. In Nebraska, the standard applied was tantamount to reasonable doubt, to wit, such evidence of voluntariness as "excludes any other hypothesis." State v. Longmore, 178 Neb. 509,

139 NW 2d 66 (1965). In State v. Yough, supra, the Supreme Court of New Jersey, while agreeing with Judge Burger in Clifton that Jackson v. Denno does not require a reasonable doubt standard under the Massachusetts procedure, nevertheless expressed the view that:

> "[T]he safer course would be for our trial judges to use that standard in all future hearings on voluntariness and admissibility. This would avoid uncertainty and confusion and the danger of later unsettlement; as a practical matter, it would make little difference, for as was pointed out in the concurring opinion in Clifton v. United States, supra, '[t]here is only a relatively narrow zone of cases in which a judge in a criminal matter will be "satisfied" of voluntariness though he harbors a reasonable doubt.' 371 F.2d at p. 364. * * * In the exceptional instance where reasonable doubt remains though the evidence preponderates in the State's favor, the defendant may receive an additional protection not compelled by the precedents or the constitution, but in the overall the sound administration of justice may perhaps be better served." 4/

In England, voluntariness must be established beyond a reasonable doubt at the initial hearing on admissibility and the Crown has the burden of proof. In Canada, while it is apparently not specifically required that voluntariness be established beyond a reasonable doubt, a similar rule is followed in practice. Development in the Law - Confessions, 79 Harv. L.Rev. 935, 1095-96 (1966).

While we cannot assert that there is a unanimity of case law in support of our contention that the reasonable doubt standard is consti-

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4/ Critiques of the Clifton case appeared in The United States Court of Appeals for the District of Columbia Circuit: 1966-1967 Term - Criminal Law and Procedure, 56 Geo. L.J. 58, 104 (1967) and Comment, 43 Notre Dame Lawyer 115 (1967). Both comments favored the "beyond a reasonable doubt" test and observed that if the judge does not apply that test, the practical effect may be that no one will. Georgetown Note, supra, at 108; Notre Dame Comment, supra, at 124.

tutionally required, we submit that there is ample precedent combined with cogent if not compelling reasoning for this Court at least to enunciate the reasonable doubt standard in the exercise - as Judge Leventhal alternatively suggested - of the Court's supervisory powers over the administration of justice in this District.

If this Court should decide on a lower standard of proof for the trial judge's determination, it should, as a bare minimum, require the judge to conclude that the jury could reasonably determine that the confession is voluntary beyond a reasonable doubt. Such a requirement would be in harmony with the principle that "[i]t is the function of the judge to deny the jury any opportunity to operate beyond its province" and with the rule that "a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." Curley v. United States, 81 U.S.App.D.C. 389, 392, 160 F.2d 229, 232, cert. denied, 331 U.S. 837 (1947). In United States v. Masiello, 235 F.2d 279 (2d Cir.), cert. denied sub nom. Stickel v. United States, 352 U.S. 882 (1956), Judge Frank, in his concurring opinion, stated:

> "[I]f, for the judge, the beyond-a-reasonable-doubt test can have no 'quantitative value' greater than the 'preponderance' test, and therefore he may not use the criminal test as either a pre-verdict or post-verdict check on the jury - then, if the jury finds the accused guilty, we may easily have a case where the judge must let the verdict stand although he is sure that guilt could not reasonably have been proved by anything more than a preponderance of the evidence." Id. at 288.

> "The reason for requiring a higher standard of probability in a criminal case is, of course, that a criminal conviction entails far more serious consequences than a civil judgment. If the judges abandon responsibility for determining whether reasonable juries could find that derivative inferences ('circumstantial evidence') meet that higher standard, I think that they cut the heart out of our oft-repeated boast that, in this land, no man can be jailed or put to death by the Government unless proof of his guilt has been established beyond a reasonable doubt." Id. at 294. 5/

If the sufficiency of evidence determination required in Curley is required in a determination of voluntariness, a new trial with the confession excluded should be ordered since, as the Court has already determined on the record before it, the confession cannot fairly be found voluntary beyond a reasonable doubt (slip opinion, p. 18).

5/ Applying this reasoning of Judge Frank, the Court in United States v. Melillo, 275 F.Supp. 314 (E.D.N.Y. 1967) held that the judge's test of the sufficiency of the evidence cannot be the same in a criminal as in a civil case.

II. A NEW TRIAL WOULD BE THE APPROPRIATE RELIEF

In its opinion of December 20, 1967, the Court stated that if the reasonable doubt standard is held applicable to the District Judge's determination, "a new trial must be held without introducing the confession in evidence." It is respectfully suggested that even if a lesser standard of proof should be adopted by the Court en banc, a new trial should be ordered without the confession.

The Supreme Court deems it to be its duty as a reviewing court "to examine the entire record and make an independent determination of the ultimate issue of voluntariness" (e.g., Davis v. North Carolina, 384 U.S. 737, 741-42 (1966)). Since this Court should do no less,[6/] it is submitted that even under a "preponderance of evidence" test it should be held that the District Judge cannot be satisfied that the confession was voluntary.

Although in the opinion of December 20, 1967, reversing the District Judge's determination, this Court did not rely on facts which had not been brought to his attention - including such factors as Appellant's scanty education, his low I.Q., the uncontradicted testimony of organic brain damage to him in the past, and discontinuance of police questioning due to his condition - it held that the failure of the detective to testify that he had advised Appellant of his right to remain silent was substantially different in nature. Even in a pre-Miranda trial, the judicial determination of voluntariness vel non must take into account the lack of warning (Johnson

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6/ In Fuller v. United States, No. 19,532, decided November 20, 1967, this Court stated that "[b]ecause of the profound significance of the values protected by the rule excluding involuntary confessions, we have undertaken an independent canvass of the record to ascertain whether the prosecution established that this was a voluntary confession." (slip opinion, p. 18.)

v. New Jersey, 384 U.S. 719 (1966); Davis v. North Carolina, 384 U.S. 737, 740 (1966)). If at a new hearing on the confession all the facts which were previously omitted, as well as the medical testimony concerning Appellant's indifference to self-protection when he allegedly confessed, are taken into account in the light afforded by this Court's opinion as to the constitutional significance of such facts, a determination that the confession was voluntary - even using "conventional admissibility criteria" - could not be sustained by this Court. See, Brief and Reply Brief for Appellant in this case, pp. 13-27 and pp. 6-7, respectively.

But even if we are wrong on that point and the District Judge is allowed again to pass upon the question of voluntariness, we submit that a new trial is mandatory, because at the previous trial the jury was inadequately instructed on their responsibility with respect to the determination of voluntariness. Thus, even if the case is remanded for a new hearing on voluntariness by the District Judge, his determination should be made in the context of a new trial.

The jury was not given adequate guidelines to evaluate the constitutional significance of Appellant's condition so that they could determine that notwithstanding the evidence of brain concussion, intoxication, lethargy, abstinance of warnings to remain silent, indifference to self-protection, etc., the confession was beyond a reasonable doubt an expression of the defendant's own free will or intellect. Instead, the instruction placed stress on "duress," "coercion," "inducement" and "misrepresentation" as grounds for excluding the confession. We doubt that the inadequacy was overcome by the summary statement that

> "if you should find that due to the defendant's physical condition, he was unable to comprehend the nature of his confession or admission,

> or that due to his condition the admission or confession was not voluntary, then you must disregard it." 7/

Indeed, this instruction was open to the possible inference by the jury that the burden was on the defendant to prove the confession involuntary, which, of course, is erroneous. Moreover, the failure of the charge clearly to distinguish between voluntariness, on the one hand, and reliability and truthfulness of the statement on the other 8/ involved a substantial likelihood that the jury was misled. Finally, although the charge contained a general reasonable doubt instruction, 9/ there was no instruction that the jury must specifically find the confession voluntary beyond the reasonable doubt. 10/

7/ Charge to the Jury, pp. 8-9, included in Partial Transcript of Proceedings which the Clerk has reproduced for use at the en banc hearing.

8/ The instruction stated: "Ordinarily a person does not admit that he has committed a crime unless the admission is true" (p. 7).

9/ "The burden is on the government to prove the defendant guilty beyond a reasonable doubt" (p. 5); "the burden of proof is on the government as to all elements of the case" (p. 29).

10/ Although defense counsel did not object to the instructions, it is urged that since this case is still on direct appeal they be reviewed as "plain error" under Rule 52(b), Federal Rules of Criminal Procedure. The error was obviously prejudicial, because the Court has now determined that "it cannot be found beyond a reasonable doubt that the confession was voluntary . . ." (slip opinion, p. 18). The fact that this appeal is from a hearing on voluntariness should not deter the Court from reconsidering the 1963 jury instructions in light of Jackson v. Denno and its impact on the judge-jury allocation of functions. See Hutcherson v. United States, 122 U.S.App.D.C. 51, 56, 351 F.2d 748, 753 (1965). The judge's determination of voluntariness, which was the focus of the Supreme Court remand, was prompted by a general concern that appellant not be convicted by reason of an involuntary confession.

If the jury were presumed to have disregarded the confession, it is doubtful whether it could have reasonably convicted Appellant on the remaining evidence. The Government has not contended that Appellant could have been so convicted. Other than that of Appellant, who testified that the victim initiated the shooting, there was no eye-witness testimony concerning the circumstances preceding the shooting. In cases resting entirely on circumstantial evidence, "unless there is substantial evidence of facts which exclude every reasonable hypothesis but that of guilt, the verdict must be not guilty . . . ." Carter v. United States, 102 U.S.App.D.C. 227, 231, 252 F.2d 608, 612 (1957). In this connection, it may be noted that an instruction on this latter point was not given to the jury in the instant case.

In view of all these infirmities in the charge, it is submitted that any new hearing by the District Judge on voluntariness must be followed by new instructions to the jury. In short, a new trial is the only appropriate relief.

Respectfully submitted,

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